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In the Supreme Court of the United States

OCTOBER TERM, 1986

KATRINA MAXTONE-GRAHAM,
Petitioner

v.

JAMES T. BURTCHAELL, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals violated this Court's decisions in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), by refusing to apply the presumption that commercial works infringing copyrighted expression may not rely on the fair use defense (17 U.S.C. § 107).

2. Whether the court of appeals erred in holding that the copyright infringement here was a fair use as a matter of law, despite respondents' verbatim quotation (and misquotation) of over 7,000 words from petitioner's book and despite the existence of genuine issues of material fact concerning respondents' deliberate misrepresentation of sensitive portions of that book.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Andrews & McMeel, Inc., and Harper & Row, Publishers, Inc., were appellees in the court of appeals and are respondents in this Court.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Katrina Maxtone-Graham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 15, 1986.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-23a) is reported at 803 F.2d 1253 (2d Cir. 1986). The opinion of the district court (App. C, *infra*, 25a-38a) is reported at 631 F. Supp. 1432 (S.D.N.Y. 1986).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 24a) was entered on October 15, 1986. On December 17, 1986, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 12, 1987 (App. D, *infra*, 39a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107 of the Copyright Act, 17 U.S.C. § 107, provides:

> Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT

A. BACKGROUND FACTS.

1. This is a copyright infringement action resulting from the quotation of more than 7,000 words from the book *Pregnant by Mistake: The Stories of Seventeen Women* (1973), written by petitioner Katrina Maxtone-Graham, in the book *Rachel Weeping*, written by respondent James Tunstead Burtchaell. Respondent Andrews & McMeel, Inc. is the publisher of the hardcover edition of Burtchaell's book, *Rachel Weeping and Other Essays on Abortion* (1982). Respondent Harper & Row, Publishers, Inc. is the publisher of the softcover edition, *Rachel Weeping: The Case Against Abortion* (1984).

Petitioner Maxtone-Graham decided to write *Pregnant by Mistake* in October 1970. The book contains a preface and edited interviews with 17 women who discussed their personal experiences with contraception and unwanted pregnancies. Some of these women had had abortions, some had placed a baby for adoption, and some had carried to term and raised the child. Maxtone-Graham chose the style of edited interviews in order to communicate to the public "in a human, real way" (*Pregnant by Mistake*, Preface x) each woman's individual point of view. Maxtone-Graham conducted the interviews between February 1971 and October 1972.[1] She described the arduous process that followed—the editing of the raw interview tapes—as "agony: to cut when needed, to clarify without distorting, to communicate exactly what each person was communicating meant pondering over every comma and every 'you know.'" *Ibid.*, Preface ix.

In April 1973, Maxtone-Graham signed a contract with Liveright publishers and received an advance of $1,500. *Pregnant by Mistake* was published in hardcover in November 1973 and sold some 2,350 copies before it went out of print in July 1982. App., *infra*, 4a. At that time, Liveright formally returned all publishing rights to Maxtone-Graham, who intended to produce a second edition of *Pregnant by Mistake* at a later date.[2] C.A. App. 180a.

Respondent Burtchaell, a Catholic priest, decided in 1976 to write *Rachel Weeping* in an effort "to critique the published accounts of 'abortion veterans'" (App.,

[1] Maxtone-Graham owns the copyright to the creative expression in *Pregnant by Mistake* through her own interviewing and editing efforts (see App., *infra*, 35a-36a; C.A. App. 253a-256a) and by assignment from all 17 interviewees.

[2] This second edition was ultimately scheduled for publication and listed in the relevant trade journals for Fall 1986. Publication has been delayed, however, until April 1987.

infra, 5a). *Rachel Weeping* contains a preface, five essays, and several appendices. It uses quotations from *Pregnant by Mistake* only in the lead essay, "Rachel Weeping," subtitled "The Veterans of Abortion." This essay is approximately 37,000 words long, covering 60 pages of the book. App., *infra*, 6a.

Burtchaell completed the essay "Rachel Weeping" in August 1978. C.A. App. 192a-193a. At that point, he first contacted Liveright to ask permission to quote liberally from *Pregnant by Mistake*. Burtchaell wrote Liveright that he "h[ad] it in mind to do a review piece" of Maxtone-Graham's book, "making comparisons with *The Ambivalence of Abortion* by Linda Bird Francke (Random House, 1978)." Burtchaell informed Liveright that his "expectation" was to quote "beyond the usual 500 or 1000 word limit." App., *infra*, 6a; C.A. App. 152a.

Burtchaell received no reply to his letter. About one month later, he telephoned Liveright and was told that his request would not be considered until his manuscript was "accepted for publication." C.A. App. 153a, 155a. The next year, in June 1979, Burtchaell signed a contract with respondent Andrews & McMeel to publish *Rachel Weeping* and received the first half of a $5,000 advance. C.A. App. 270a, 271a.

Burtchaell did not contact Liveright again until June 23, 1981, two years after signing the contract. Burtchaell wrote Liveright that "only now" was he able to "finalize [his] request," and asked permission to quote "about 5000 words" from *Pregnant by Mistake*. Burtchaell told Liveright that *Rachel Weeping* was scheduled for October 1981 publication, that he had received a $2,500 advance, and that a "first print run of 5000 [copies was] anticipated." C.A. App. 153a. On August 5, 1981, Liveright responded by requesting a copy of Burtchaell's essay "for the author's review." *Id.* at 154a. At the same time, Liveright recommended to Burtchaell that he "have a standby chapter ready" or that he "rely

on paraphrasing." Burtchaell refused, however, stating that "he had based his book on [Maxtone-Graham's] book." *Id.* at 259a-260a.

Burtchaell then sent Liveright galley proofs of "Rachel Weeping," which had already been set in type. After Maxtone-Graham read the manuscript she opposed granting permission for the copying. On November 4, 1981, Liveright telephoned Burtchaell to inform him of Maxtone-Graham's decision and that it would honor her request. App., *infra*, 6a; C.A. App. 105a.

A few days later, Burtchaell wrote directly to Maxtone-Graham, "setting forth his predicament and urging her to reconsider." App., *infra*, 6a-7a; C.A. App. 155a-157a. Maxtone-Graham again refused permission, by letter dated December 7, 1981. Maxtone-Graham stated that she felt "very, very sympathetic toward [Burtchaell's] situation as a writer," but that the women she interviewed had "told their stories in order to *further understanding* of the Pro-Choice view. They believed—and expressly stated—that their material was not to be used for any other purpose. I promised to honor their wishes." *Id.* at 158a (emphasis added). Because Burtchaell's misquotations did not further understanding, Maxtone-Graham wrote that she could not "grant the permission you are asking as I am not free to do so." *Ibid.*

Notwithstanding these denials of permission, and without further notice to Liveright or Maxtone-Graham, Burtchaell published *Rachel Weeping* in April 1982 without any deletion or alteration of the verbatim quotations from *Pregnant by Mistake.* Both the hardcover and softcover editions promoted *Rachel Weeping* with references on their covers to "firsthand accounts" about abortion. C.A. App. 257a. As of June 1985, *Rachel Weeping* had sold 6,000 copies, almost three times as many as *Pregnant by Mistake.* App., *infra*, 35a; C.A. App. 95a.

2. As published, both editions of *Rachel Weeping* contain 7,176 words taken directly from *Pregnant by Mis-*

take, including substantial excerpts from 16 of the 17 interviews conducted by Maxtone-Graham. C.A. App. 258a. This amount represents approximately 19% of the lead essay in *Rachel Weeping* and 4.3% of *Pregnant by Mistake*. App., *infra*, 6a. In other words, nearly one-fifth of "Rachel Weeping" consists of nothing more than verbatim quotations from Maxtone-Graham's copyrighted work.[3] Although the source of these quotations is not concealed, the quotes are indicated not by Maxtone-Graham's name or by express reference to *Pregnant by Mistake*, but rather by one letter (G) and the page number of the quoted material. In addition, a handful of quotes are not attributed or are misattributed. C.A. App. 24a, 245a, 246a, 248a, 249a.

Burtchaell testified at his deposition that he quoted extensively from *Pregnant by Mistake*, rather than conducting new interviews, because "as a Catholic priest I would myself encounter credibility problems" (C.A. App. 202a), and "it [was] essential for the credibility of my essay that the words of abortion veterans themselves appear." *Id.* at 201a. He also testified, however, that he had "considerable experience with abortion veterans" and "could have set out to do interviews" himself. *Id.* at 202a.

Not only did Burtchaell appropriate large quantities of Maxtone-Graham's copyrighted work, he also extracted "essentially the heart of the book" (*Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 565 (1985)—*i.e.*, some of the most expressive and poignant elements of the interviews recounted in *Pregnant by Mistake*. Two examples should suffice. First, Burtchaell reprinted verbatim the confession of a woman who described how she almost murdered the child she later gave up for adoption:

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[3] The nature and extensive scope of the copying can be readily seen by examining a photocopy of "Rachel Weeping" deposited with the Clerk of this Court, which highlights in yellow ink the copied passages.

> I put my hands around her throat like that. And I was just within an ace—of strangling her. And uh —She was then, I guess, just about six weeks. . . . But even at that age she *knew* and she just *froze.* Just like that. It was the most terrifying thing to see.

Rachel Weeping 21 (C.A. App. 43a). See *Pregnant by Mistake* 339. Burtchaell also lifted another passage in which a woman vividly described her terror in contemplating an unwanted pregnancy:

> I went through a lot of hell considering it. I wasn't too sure exactly why. But the idea was that I would be absolutely trapped, that my life would end. I never knew any little kids. I never knew any babies, or children. So it was completely foreign to me. And—it scared me. And there would be days, I do recall, when I thought, "My God, if I get pregnant, I swear I'll take my bare hands and—claw it out." I really felt that way. Just [*makes scraping noise*] dig it out.

Rachel Weeping 19 (C.A. App. 41a). See *Pregnant by Mistake* 156.

Contributing further to the unfairness of Burtchaell's use of Maxtone-Graham's work was the misleading and inaccurate manner in which many of the quotations from *Pregnant by Mistake* were inserted in *Rachel Weeping.* App., *infra,* 14-15a & n.7. A review of "Rachel Weeping" reveals at least 74 errors of various kinds in the quotations within this 60-page essay.[4] These errors ranged from minor mistakes of copying, to improper attributions, to more serious errors in which statements were taken out of context or distorted. C.A. App. 243a-251a. Perhaps most egregious was the fact that, in at least ten instances, Burtchaell quoted women who were talking

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[4] The record contains an affirmation, submitted to the district court, that lists and describes these various distortions and misquotations. See C.A. App. 243a-251a. This affirmation was supplemented by an affidavit filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

about *adoption* as if they were talking about *abortion.* App., *infra,* 15a. (The quotes on page 7, *supra,* are examples of just such adoption stories quoted as if about abortion.) The court of appeals acknowledged these errors and remarked: "Burtchaell's scholarship clearly leaves something to be desired, and it is equally unfortunate that the numerous inaccuracies in *Rachel Weeping* escaped the editors' attention." *Ibid.*

B. THE LITIGATION.

1. *The District Court Proceedings.*

Maxtone-Graham commenced this action for copyright infringement, in violation of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, in the United States District Court for the Southern District of New York. C.A. App. 3a-11a. In their joint answer, respondents did not deny their extensive copying from *Pregnant by Mistake.* C.A. App. 85a. Instead, they contended that their quotations were protected by the defense of "fair use."[5] C.A. App. 84a. This doctrine, now codified in 17 U.S.C. § 107, "was traditionally defined as 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row, Publishers, Inc.* v. *Nation Enterprises,* 471 U.S. 539, 549 (1985) (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944)).

After completion of discovery, respondents moved for summary judgment and Maxtone-Graham cross-moved for summary judgment as to liability. The district court granted respondents' motion, holding that they proved

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[5] Respondents also raised other defenses, including that Maxtone-Graham failed to record with the Copyright Office the copyright assignments she received from the 17 women interviewed for *Pregnant by Mistake.* See 17 U.S.C. § 205(d). The district court resolved this issue in favor of Maxtone-Graham. App., *infra,* 27a-31a. The court of appeals found "it unnecessary to reach the recordation argument" and "assume[d] *arguendo* that [Maxtone-Graham's] copyrights were valid" (*id.* at 3a).

"as a matter of indisputable fact that Rev. Burtchaell made fair use of Ms. Maxtone-Graham's work and the interviews therein." App., *infra*, 38a. In the district court's view, respondents' extensive quotations from *Pregnant by Mistake* were "not inconsistent with a finding of fair use," because "Rev. Burtchaell believed, probably correctly, that he needed to present portions of these individual abortion experiences in the same words in order to critique them fairly." *Id.* at 36a. In addition, the district court found that, while *Rachel Weeping* was "published * * * as a commercial venture" (*id.* at 34a), Burtchaell "did not author the essays with a primary purpose of financial gain" (*id.* at 34a-35a). Finally, the district court stated that *Rachel Weeping* did not harm the market for *Pregnant by Mistake* because Maxtone-Graham's book "was going out of print" (*id.* at 37a) when *Rachel Weeping* was published in April 1982.

The district court reached these conclusions on the basis of its view that copyright infringement claims occasionally "must yield to the right of persons to engage in full and free public discourse of ideas and issues protected by the First Amendment" (App., *infra*, 31a). In thus finding a constitutional limitation on the statutory rights granted copyright owners by Congress, the district court expressly relied on the Second Circuit's decision in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 203 (1984). Although the district court acknowledged that this Court, in reversing the Second Circuit in *Harper & Row*, "purported to reject the view * * * that the 'scope of fair use is wider when the information conveyed relates to matters of high public concern'" (App., *infra*, 31a, quoting *Harper & Row*, 471 U.S. at 555-556), the district court held that "[t]his apparently far ranging *dictum* must be recognized for what it is, and limited by the context of that case." App., *infra*, 31a-32a. The correct rule, the district court announced, is that "[p]ublic speech which is directly related to matters of high public concern *is* en-

titled to different consideration when the issue of fair use is presented." *Id.* at 32a (emphasis in original).

2. ***The Court of Appeals Proceedings.***

The court of appeals affirmed in an opinion by Judge Kaufman. App., *infra*, 1a-23a. Applying the four-factor test of fair use set forth in 17 U.S.C. § 107, the court of appeals first considered the purpose and character of the infringing work and found that "Burtchaell applied substantial intellectual labor to [Maxtone-Graham's] quotations, continually offering his own insights and opinions." App., *infra*, 14a. The court rejected Maxtone-Graham's claim that the numerous distortions and inaccuracies in the quotations were incompatible with "fair" use, finding that the errors were neither deliberate nor "so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness" (*id.* at 16a). The court of appeals reached these conclusions despite the fact that (a) the district court had failed to consider the significance of the errors that riddled *Rachel Weeping*, and (b) the case had been decided on the basis of summary judgment, and therefore issues concerning the deliberateness of Burtchaell's distortions had never been tried.

The court of appeals continued its analysis of the first factor by focusing upon the commercial nature of *Rachel Weeping*. In arguing that Burtchaell's use of the quotations from *Pregnant by Mistake* for profit-making purposes was unfair, Maxtone-Graham relied on this Court's holding in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright * * *." Judge Kaufman dismissed this argument, stating that "[o]nly an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the

Court intended to attach heightened significance to the element of commerciality." App., *infra*, 17a. The court of appeals then held that the Copyright Act does not require a clear-cut choice between "commercial" and "non-profit" uses and that "the educational elements of *Rachel Weeping* far outweigh the commercial aspects of the book." *Id.* at 18a.

Turning to the volume of quotation, the court of appeals agreed with the district court that Burtchaell's verbatim appropriation of more than 7,000 words from *Pregnant by Mistake* was not incompatible with a finding of fair use. App., *infra*, 19a-20a. The court added that it could not "be said that Burtchaell took the heart of *Pregnant by Mistake*, since Maxtone-Graham's book consists of narratives by 17 women, and has no identifiable core that could be appropriated." *Id.* at 20a.

In analyzing the final fair use factor (the effect of the use on the potential market), the court of appeals characterized as *dictum* this Court's statement in *Sony Corp.*, 464 U.S. at 451, that every commercial use presumptively results in harm to the market. App., *infra*, 21a. Instead, the court held that "the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects" and that it was "abundantly clear that *Rachel Weeping* poses no more than an insignificant threat of economic damage to Maxtone-Graham." *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit presents several legal issues of substantial practical importance regarding the fair use defense—a defense that is critical in many copyright infringement cases. The court of appeals upheld a grant of summary judgment sanctioning the defense of fair use, despite the fact that respondents —after being denied permission—quoted and misquoted more than *7000 words* of petitioner's copyrighted work, including passages comprising the heart of the work.

In addition, the court of appeals ruled that this Court's holding in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985), that "every commercial use of copyrighted material is presumptively an unfair exploitation" cannot be taken literally and that this Court did not "intend[] to attach heightened significance to the element of commerciality" in fair use determinations. App., *infra*, 17a.

These rulings, as the *Copyright Law Journal* recently noted, "broaden[] the scope of the fair use defense by applying the doctrine less strictly than the Supreme Court" and are "difficult to reconcile with *Sony*, *Harper & Row*, and other fair use decisions" (3 C.L.J. 40, 42 (Dec. 1986)). As a result, the decision below deprives copyright holders of significant and valuable protections granted by Congress in the Copyright Act of 1976. These adverse effects are particularly pronounced because of the Second Circuit's status as "the nation's premier copyright court" (*Gracen* v. *Bradford Exchange*, 698 F.2d 300, 305 (7th Cir. 1983)). In these circumstances, further review by this Court is plainly warranted.

I. THE COURT OF APPEALS ERRED IN REFUSING TO APPLY THE PRESUMPTION THAT COMMERCIAL INFRINGEMENTS MAY NOT RELY ON THE FAIR USE DEFENSE.

A. The Presumption That Commercial Infringements Have An Improper Purpose And Character.

The fair use section of the Copyright Act, 17 U.S.C. § 107, lists, as the first factor to be considered by the courts, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." This Court has repeatedly held that this provision means that the commercial use of copyrighted material is presumptively unfair. In

Sony Corp. v. *Universal City Studios, Inc.*, 464 U.S. 417, 449, 451 (1984), for example, the Court stated:

> If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. * * * Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.

Just one year later, in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985), the Court quoted the above passage with approval. See also 3 Nimmer on Copyright § 13.05[A][1] at 13-71 (1986).

In this case, there can be no doubt that *Rachel Weeping* is a work of a "commercial nature," as that term is used in Section 107(1). As the district court remarked, "Harper & Row published *Rachel Weeping* as a commercial venture" and as "a 'for profit' endeavor. Harper & Row paid Rev. Burtchaell a $5,000 advance and advertised the book nationally." App., *infra*, 34a. Both Harper & Row and Andrews & McMeel are commercial, for-profit publishers, and *Rachel Weeping* apparently was successful enough to warrant both hardcover and softcover editions. The court of appeals noted as well that "Burtchaell was paid for his efforts and * * * his publishers were not motivated by purely charitable intentions." *Id.* at 17a.

Nonetheless, the courts below ignored this Court's decisions concerning the weight to be given to the factor of commercial use in the fair use determination. The district court relied instead on a 20-year-old Second Circuit decision, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (1966), cert. denied, 385 U.S. 1009 (1967), which held that commercial motives are "irrelevant" to the fair use inquiry. See App., *infra*, 34a. On appeal, the court of appeals took a slightly dif-

ferent approach to avoid the result dictated by *Sony Corp.* and *Harper & Row.* Contrary to the plain language of Section 107(1), the court below declared that it was *not* "require[d] * * * to make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit.'"[6] App., *infra*, 17a-18a. It then construed this Court's decision in *Sony Corp.* into oblivion by further holding:

> Only an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened significance to the element of commerciality.

Id. at 17a.

The court of appeals' unabashed refusal to follow this Court's decisions on this point is further demonstrated by its reasoning. The court below supported its position that it need not distinguish between "commercial" and "non-profit" uses of copyrighted materials by quoting a lower court opinion that "[a]ll publications presumably are for profit" (App., *infra*, 18a, quoting *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, affirmed, 272 App. Div. 759, 69 N.Y.S. 2d 432 (1st Dept. 1947)). Presumably, because all publications are allegedly commercial, the fair use determination cannot rest on the commerciality factor but must be judged by some other standard. The test that the Second Circuit substituted is whether the "educational elements" of a publication "outweigh the commercial aspects of the book." App., *infra*, 18a.

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[6] The court of appeals also ignored the clear language of 17 U.S.C. § 107(1) by quoting only "nonprofit" rather than the full modifier "nonprofit educational." Later in its opinion, the court relied on the word "educational," while omitting the word "non-profit." App., *infra*, 18a. At *no* point in its opinion did the court of appeals find *Rachel Weeping* to be "for nonprofit educational purposes," as the statute requires.

Putting aside whether the court of appeals' newfangled test—which evaluates whether a book that is published for profit is predominantly "commercial" or "educational"—is workable in practice, or whether that test was even applied correctly in this case,[7] it was simply not within that court's prerogatives to devise a new standard, in conflict with the one set forth in the Copyright Act and construed by this Court in *Sony Corp.* and *Harper & Row.* See 3 C.L.J. at 41. Indeed, the Second Circuit's content-based analysis of commercial use in this case is virtually identical to the Second Circuit's discredited opinion in *Harper & Row* (also written by Judge Kaufman) that commercial motive is irrelevant if the use furthers the public interest. See 723 F.2d at 208. This Court held that that argument "misses the point entirely." *Harper & Row*, 471 U.S. at 562. See Francione, *Facing The Nation: The Standards For Copyright, Infringement And Fair Use Of Factual Works*, 134 U. Pa. L. Rev. 519, 546, 549 (1986).

The same is true here: the content of an infringing work, whether "educational" or "news reporting," is sim-

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[7] The court of appeals acknowledged that "*Rachel Weeping* involved some commercial aspects," but concluded that "it was first and foremost an essay expressing a certain point of view on the abortion issue," and, thus, "educational." App., *infra*, 18a. We question the "educational" value of a book that quotes women speaking of adoption as if they were referring to abortion. See pages 7-8, *infra*. We also question the court of appeals' statement—in conflict with Burtchaell's own deposition testimony (C.A. App. 190a)—that respondents' sale of 6,000 copies of *Rachel Weeping* was "hardly a commercial blockbuster" (App., *infra*, 18a). Many publications, such as a textbook on quantum mechanics or a treatise on constitutional law, have undeniable educational uses and will never make the "best-seller" list, yet they plainly are for-profit commercial ventures. In any event, since the district court had not evaluated *Rachel Weeping* according to this test, the court of appeals usurped the trier of fact's role in finding, without any record support, that "the educational elements of *Rachel Weeping* far outweigh [its] commercial aspects" (*ibid.*). See page 24, *infra*.

ply irrelevant to the commercial/non-profit inquiry prescribed by Section 107. As this Court remarked in *Harper & Row*, "[t]he crux of the profit/nonprofit distinction is not whether the *sole* motive of the use is monetary gain" but whether the infringer stands to profit from exploitation of the copyrighted material. 471 U.S. at 562 (emphasis added). Respondents plainly stand to profit from Burtchaell's acknowledged exploitation of large portions of Maxtone-Graham's work. See Nimmer, *supra*, § 13.05 [A][1] at 13-72 n.25.5 ("An educational use which is rendered for profit will be regarded as the equivalent of a commercial use.").

Other courts have adhered to this Court's rulings in *Sony Corp.* and *Harper & Row* and focused solely on whether the infringing work had a commercial purpose.[8] In *Supermarket of Homes, Inc.* v. *San Fernando Valley Board of Realtors*, 786 F.2d 1400 (9th Cir. 1986), for example, the plaintiff claimed that its use of defendant's multiple listing service brochures was fair because it was designed for informational purposes of homebuyers. The Ninth Circuit disagreed, finding instead that the plaintiff's use was for commercial purposes—the sale of homes. *Id.* at 1409. Similarly, in *Pacific & Southern Co., Inc.* v. *Duncan*, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985), a defendant that copied and sold portions of news broadcasts to the subjects of the broadcasts claimed that the sales "served an important societal interest in full access to the news." *Id.* at 1495. The Eleventh Circuit nonetheless applied the *Sony Corp.* presumption, holding that the sale of the tapes was for a commercial purpose. And in *Educational Testing*

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[8] Ironically, a prior panel of the Second Circuit had remarked that this "Court could hardly have been more lucid on this point, stating that 'every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright * * *.'" *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, 751 F.2d 501, 508 (1984) (quoting *Sony Corp.*, 464 U.S. at 451).

Services v. *Katzman*, 793 F.2d 533, 543 (3d Cir. 1985), the Third Circuit concluded that a service intended to prepare students to take college entrance exams was commercial, despite its obvious educational value. See also *Radji* v. *Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985) (rejecting the argument that defendant's commercial use of plaintiff's book was a fair use because the book was newsworthy).

On the other hand, several courts have committed the same error as the court below, ignoring the commercial purpose of an infringing work because of its perceived social or educational value. Thus, in *Haberman* v. *Hustler Magazine, Inc.*, 626 F. Supp. 201, 210 (D. Mass. 1986), the court "recognized that *Hustler* magazine is a publication which seeks to earn a profit," but held nonetheless that "[t]he fact that *Hustler* magazine is offered for sale * * * does not dictate a finding that the reproduction of [plaintiff's] works was a commercial use." In *Fisher* v. *Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the court held that a commercially-distributed parody of a hit song, which concededly copied several bars of music from plaintiff's copyrighted work, was more "commentary" than "commercial." And in *Update Art, Inc.* v. *Maariv Israel Newspaper, Inc.*, 635 F. Supp. 228, 231 (S.D.N.Y. 1986), the court held that a commercially-distributed satirical poster "may be deemed to be commentary or news reporting" and that this factor weighed heavily in favor of fair use.

This Court should grant review here to eliminate the confusion in the lower courts over the seemingly unambiguous rulings in *Sony Corp.* and *Harper & Row*. In evaluating the "purpose and character" of an infringing use, the crucial determinant under Section 107(1) is whether the use is, at least in part, for a commercial purpose. If it is, then the copyright laws safeguard the economic value of the copyright by imposing a strong presumption against a finding of fair use. The Second

Circuit plainly erred in repudiating that rule and instead substituting a different test that requires the courts to assess the content of the infringing work and make an essentially subjective determination of whether "commercial" or "educational" elements predominate. That standard greatly diminishes the statutory protections granted copyright holders by inviting infringers to package their profit-making ventures as "educational" or "in the public interest." See *Harper & Row*, 471 U.S. at 558.

B. The Presumption That Commercial Infringements Harm The Market For the Copyrighted Work.

The court of appeals also erred in ignoring this Court's construction of the fourth fair use factor codified in 17 U.S.C. § 107—"the effect of the use upon the potential market for or value of the copyrighted work." This Court squarely held in *Sony Corp.* that harm may be presumed when an infringing work has a commercial purpose:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. *If the intended use is for commercial gain, that likelihood may be presumed.* But if it is for a noncommercial purpose, the likelihood must be demonstrated.

464 U.S. at 451 (second emphasis added). The import of this language seems beyond dispute: the fourth fair use factor, like the first, applies differently to commercial and noncommercial infringers. Commercial copying

occupies a disfavored position, and as a result harm will be presumed absent evidence to the contrary. See, *e.g.*, *National Football League* v. *McBee & Bruno's Inc.*, 792 F.2d 726, 729 (8th Cir. 1986) (applying presumption of harm); *Brewer* v. *Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) ("[s]ince the use was of a commercial nature, harm to Brewer could be presumed"); *Pacific and Southern Co., Inc.* v. *Duncan*, 744 F.2d at 1497 (there is a "presumption * * * that a commercial use naturally produces harmful effects").

Despite this Court's unequivocal holding, both courts below placed the burden of proving harm on Maxtone-Graham. The district court stated that "[i]f [Maxtone-Graham] cannot demonstrate that she has suffered any adverse economic impact, then the 'free speech' considerations subsumed in the first two factors of the fair use analysis militate wholly in favor of the [respondents]." App., *infra*, 37a. The court of appeals likewise shifted the burden of proof to Maxtone-Graham, stating that "[s]he is unable to point to a single piece of evidence portending future harm." *Id.* at 22a. This was plain error under *Sony Corp.*

The court of appeals offered three reasons for refusing to follow the decision in *Sony Corp.* First, Judge Kaufman speculated that this Court really did not mean what it said in *Sony Corp.* because—"[c]uriously," in the Second Circuit's words—"this bifurcated analysis was not employed by the Court when, only a year later, the issue of fair use resurfaced in *Harper & Row*." App., *infra*, 21a. The court of appeals' speculation was clearly misguided. This Court had no reason to rely on the presumption of harm in *Harper & Row* because "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage." 471 U.S. at 567. Nothing in *Harper & Row* suggests that the Court intended to repudiate, *sub silentio*, its holding of a year earlier.

Second, the court of appeals concluded that *Sony's* presumption of market harm was inapplicable to this case

because of its "conclusion that the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects" (App., *infra*, 21a). But here again, as with the Second Circuit's discussion of the first fair use factor, there is absolutely no support in the statute or this Court's decisions for applying a subjective, content-based balancing test to commercial infringing works to determine whether their "noncommercial elements" predominate. See pages 15-16, *supra*. The obvious commercial nature of *Rachel Weeping*, 6,000 copies of which have already been sold to the general public by major publishing houses, was sufficient to bring it within the *Sony* presumption.

Third, the court of appeals held that "whether we presume harm, or search for proof of it, it is abundantly clear that *Rachel Weeping* poses no more than an insignificant threat of economic damage to Maxtone-Graham" because "the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats." App., *infra*, 21a-22a. This statement evidences a gross misunderstanding of the "functional test" applied under the fourth fair use factor. See Nimmer, *supra*, § 13.05[B] at 13-86 to 13-87. As Professor Nimmer has explained:

> If *both* the plaintiff's and defendant's works are used for the same purpose, then under the functional test the defense of fair use should not be available since the defendant's work serves the same function as that of the plaintiff's.

Id. at § 13.05[B] at 13-90.2 (footnote omitted).

Application of this functional test strongly favors Maxtone-Graham's claim of copyright infringement and defeats any claim of fair use. Both *Pregnant by Mistake* and *Rachel Weeping* are books that serve the same function of offering information and opinions about, *inter alia*, abortion and adoption. Both books use the same 16 interviews for precisely the same purpose—as

first-hand accounts and opinions about unwanted pregnancies. The sole differences between the books mentioned by the court of appeals—the disparate formats and opposing viewpoints—have nothing at all to do with the functional test, and provide no reason for ignoring the presumption of harm required by this Court in *Sony Corp.*

Plainly, "unrestricted and widespread conduct of the sort engaged in by [Burtchaell] * * * would result in a substantially adverse impact on the potential market for or value of [Maxtone-Graham's] present work." Nimmer, *supra*, § 13.05[A][1] at 13-79 (footnotes omitted). *Rachel Weeping* copies many of the most interesting passages of *Pregnant by Mistake.* Accordingly, persons interested in obtaining some insight into the abortion debate by hearing first-hand from women facing unwanted pregnancies could "gain the impression that they are learning from [Burtchaell] what [Maxtone-Graham] has written" and might well conclude that there is no reason to purchase *Pregnant by Mistake.* See *Salinger* v. *Random House, Inc.*, No. 86-7957 (2d Cir. Jan. 29, 1987), slip op. 1281-1282. The copyright laws are designed to protect against that economic harm. See *Harper & Row*, 471 U.S. at 568.

II. THE COURT OF APPEALS ERRED IN HOLDING AS A MATTER OF LAW THAT RESPONDENTS' COPYING OF MORE THAN 7,000 WORDS FROM PETITIONER'S BOOK WAS A FAIR USE.

Even if the court of appeals were correct in concluding that *Rachel Weeping* was not a work of a "commercial nature," it still erred in upholding the grant of summary judgment. The court below acknowledged that "[b]ecause the fair use question is so highly dependent on the particular facts of each case, courts * * * have usually found it appropriate to allow the issue to proceed to trial." App., *infra*, 8a. Yet it held that respondents' tak-

ing of Maxtone-Graham's copyrighted materials was a fair use as a matter of law, thus dispensing with any evidentiary proceedings. That ruling cannot be squared with this Court's prior decisions or with the facts of this case.

The third fair use factor identified in 17 U.S.C. 107 relates to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." In finding that Burtchaell's verbatim copying of *7,176 words* from *Pregnant by Mistake* qualified as a fair use, the court of appeals ignored both of these elements. First, the court below focused solely on the percentage of *Pregnant by Mistake* that was appropriated (4.3%) and totally ignored the central role that Maxtone-Graham's creative expression played in *Rachel Weeping*—19% of the lead (and title) essay. Compare *Harper & Row*, 471 U.S. at 548 (no fair use where verbatim quotes amounted to 13% of the infringing work).[9] Moreover, the appropriations here constituted "the heart of" *Pregnant by Mistake*. See *Harper & Row*, 471 U.S. at 539. Burtchaell took passages from 16 out of 17 chapters from Maxtone-Graham's book, including some of the most critical and emotional passages. See pages 6-7, *supra*. Indeed, it is reasonable to conclude—as Burtchaell himself admitted (C.A. App. 201a-202a, 259a-260a)—that "Rachel Weeping" simply could not have been written if Burtchaell had not been able to reproduce large portions of Maxtone-Graham's copyrighted work.[10] "To a large ex-

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[9] "Rachel Weeping" uses quotes from *Pregnant by Mistake* on 68% (41 pages) of its 60 pages. C.A. App. 23a-82a. Compare *Salinger*, slip op. 1280 (no fair use where copyrighted works were quoted or paraphrased on at least 40% of the infringing book's 192 pages).

[10] The Second Circuit found that the amount used by Burtchaell was appropriate to fair use because the quotations made *Rachel Weeping* "more persuasive." App., *infra*, 20a. In this regard, Burtchaell testified that he rejected the idea of doing original research or of paraphrasing *Pregnant by Mistake* because "I con-

tent, they make ["Rachel Weeping"] worth reading." *Salinger*, slip op. 1280.

In other instances, courts have had little trouble finding that far lesser copyings were both quantitatively and qualitatively substantial in denying fair use defenses. See, *e.g.*, *Harper & Row*, 471 U.S. at 545, 579 (300 words out of 200,000 word unpublished manuscript); *Educational Testing Services* v. *Katzman*, 793 F.2d at 542 ("handful of questions out of thousands"); *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), affirmed, 672 F.2d 1095 (2d Cir.), cert. denied, 459 U.S. 826 (1982) (use of a few minutes from each of six hour-long films). At the very least, the substantiality question here was not so clear-cut that it should have been taken from the jury.

By the same token, it was highly relevant to the fair use determination that *Rachel Weeping* contained numerous errors and distortions. See Nimmer, *supra*, § 13.05[A][1] at 13-72 to 13-73. "Fair use," after all, is an "equitable rule of reason" (*Sony Corp.*, 464 U.S. at 448) that "presupposes 'good faith' and 'fair dealing.'" *Harper & Row*, 471 U.S. at 562. The court of appeals agreed that many of Maxtone-Graham's charges in this regard were "well-founded—especially those relating to [Burtchaell's] muddling of adoption and abortion experiences." App., *infra*, 15a. Certainly, a critique of abortion that relies on misidentified quotations concerning adoption is so obviously inequitable that *any* quotation is an unfair use.

Nonetheless, the court again held, as a matter of law, that Burtchaell did not engage in any of the distortions

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sidered it essential for the credibility of my essay that the words of abortion veterans themselves appear." C.A. App. 201a. This Court rejected a similar excuse for the use of verbatim excerpts in *Harper & Row*, 471 U.S. at 565 (defendant's editor testified that he quoted copyrighted passages "precisely because they qualitatively embodied [President] Ford's distinctive expression").

of Maxtone-Graham's work deliberately. There are several things to be said in response to this remarkable finding. To begin with, we believe that it makes far more sense for the fair use defense to depend upon an objective determination of whether the copyrighted work has been used unfairly, rather than upon proof of a deliberate intent to distort. But if proof of Burtchaell's subjective intent was in fact necessary, then the court of appeals plainly usurped the fact-finder's role in concluding that the misrepresentations and distortions here were the product of mere carelessness.[11] See *Harper & Row*, 471 U.S. at 560 (fair use can be decided by an appellate court only "[w]here the district court has found facts sufficient to evaluate each of the statutory factors"); Francione, 134 U. Pa. L. Rev. at 531. There has never been a trial in this case; the court below had no evidentiary basis on which to conclude that Burtchaell's errors were the product of mere negligence, and there was in fact substantial reason to conclude the opposite.[12] What is more, respondents had the burden of proof on this issue.

In sum, the court of appeals' holding that respondents were entitled to the defense of fair use as a matter of law—despite their verbatim taking of more than 7,000 words of copyrighted materials, despite the commercial

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[11] As noted above (see page 10, *supra*), the district court completely failed to address the significance of the distortions.

[12] Many of the errors in *Rachel Weeping* are so blatant that it is difficult to attribute them to mere carelessness. For example, Burtchaell quoted some ten times from the story of Gail (*Pregnant by Mistake* 385-435), whom he had twice correctly identified as a woman who did not have an abortion but instead placed her child for adoption. *Rachel Weeping* 6-7, 42. Yet elsewhere in his book Burtchaell quoted Gail in a section introduced as "an interview sample of persons who had made choices—sometimes repeatedly—for abortion." *Rachel Weeping* 29; see also *id.* at 55. Notably, all of the errors are in this direction. Burtchaell never misquoted an abortion experience as if it referred to adoption.

nature of the use, and despite the acknowledged misrepresentations and misquotations—represents a drastic limitation on the rights in creative expression granted by the Copyright Act and recognized by this Court in *Sony Corp.* and *Harper & Row.* This decision is all the more damaging because the publishing industry is centered in New York City, and the most important copyright infringement cases therefore arise within the Second Circuit. Accordingly, it is essential that this Court bring the Second Circuit into line with the standards set forth in 17 U.S.C. § 107 and this Court's recent decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 92—August Term, 1986

(Argued September 11, 1986 Decided October 15, 1986)

Docket No. 86-7349

KATRINA MAXTONE-GRAHAM,
Plaintiff-Appellant,

—against—

JAMES TUNSTEAD BURTCHAELL, ANDREWS & MCMEEL, INC., and HARPER & ROW PUBLISHERS, INC.,
Defendants-Appellees.

Before:

KAUFMAN, WINTER and PRATT,
Circuit Judges.

KAUFMAN, *Circuit Judge:*

Nearly half a century ago, a distinguished panel of this Court including Learned Hand called the question of fair use "the most troublesome in the whole law of copyright," *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). That description remains accurate today. Since Judge Hand's time, the common law doctrine has been inscribed into the Copyright Act, but the fair use inquiry continues to require a difficult case-by-case balancing of complex factors.

The purpose of fair use is to create a limited exception to the individual's private property rights in his expression—rights conferred to encourage creativity—to promote certain productive uses of existing copyrighted material. Fair use has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright]." [1]

In this case, we are asked to decide whether the district court properly granted summary judgment in favor of the defendants on the basis of the affirmative defense of fair use in an action for copyright infringement. Plaintiff had published a book of interviews with women discussing their experiences with abortion and unwanted pregnancy. Several years later, defendant Burtchaell was preparing a series of essays on abortion, and requested permission to quote extensively from plaintiff's interviews. Despite the denial of permission, he included numerous verbatim quotations in his book.

Plaintiff commenced an action for copyright infringement in the Southern District of New York (Charles L. Brieant, *District Judge*). Defendants moved for summary judgment, pursuant to Fed. R. Civ. P. 56, on two grounds: failure to file the copyright assignments and fair use. Plaintiff then unsuccessfully cross-moved for summary judgment on the question of liability. Defendants' motion contended first that the district court lacked jurisdiction because plaintiff failed to record with the Copyright Office the assignments that she obtained from the women interviewed. Defendants maintained that the 1976 amendments to the Copyright Act, which require that such transfer agreements be filed, applied retro-

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[1] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), (*quoting* Ball, *The Law of Copyright and Literary Property* 260 (1944)).

actively to plaintiff's pre-1976 assignments.[2] The district court rejected defendants' interpretation of the copyright amendments and declined to grant summary judgment on this basis.

Because we now affirm the lower court's grant of summary judgment on the fair use defense, we find it unnecessary to reach the recordation argument. Instead, we shall assume *arguendo* that the plaintiff's copyrights were valid and proceed directly to the fair use question. At the outset, we acknowledge that summary judgment on the question of fair use has been the exception rather than the rule. After analyzing the alleged facts in dispute and the fair use factors, however, we conclude that the fair use defense was properly sustained at the summary judgment stage, even when the facts are considered in the light most favorable to plaintiff.

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[2] The relevant portion of the Act provides that:

> No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

17 U.S.C. Sec. 205(d) (1982). When Maxtone-Graham published *Pregnant by Mistake* in 1973, the Act did not require her to record the transfers, and she claims she would have been unable to publish the book if recordation was required because she would have been forced to compromise the anonymity of the women. In view of this, the district court held that:

> Congress could not have intended the 1976 Act to bar the rights of those who own works published and copyrighted validly under the earlier Act, and find themselves unable for practical reasons then unforeseeable, to record their prior transfers now. . . . Accordingly, plaintiff's failure and her inability to record the transfers under the New Copyright Act will not bar her complaint under the special circumstances which exist here and preclude recordation.

A. FACTS

1. *Pregnant by Mistake*

In 1973, Katrina Maxtone-Graham published a book entitled *Pregnant by Mistake*, consisting of interviews with 17 women who had discussed with her their unwanted pregnancies. The names of the interviewees were changed to assure anonymity. Most of the women discussed the circumstances surrounding their abortions, but some explained decisions to carry a pregnancy to term and either to give the child up for adoption or raise the child themselves. Maxtone-Graham tape recorded all of the interviews, and after having transcripts prepared, she edited the texts to avoid repetition and unnecessary verbiage. At the time of the interviews, all of the women signed copyright assignments in favor of the plaintiff, but these agreements were never recorded with the Copyright Office.

In August 1973, Liveright published *Pregnant by Mistake*, and 2,349 copies of the book were sold from the day of publication (August 31, 1973) to the day it went out of print (March 31, 1982), with almost 2,000 of the sales occurring within four months of publication. On February 25, 1982, just before her book was to go out of print, Maxtone-Graham obtained from Liveright all publishing rights to *Pregnant by Mistake*. Maxtone-Graham owns a small publishing company, and her stated intention was to produce a "very small printing for people who have requested copies" at an indefinite time in the future. To date, no second edition of the book has been published.

2. *Rachel Weeping*

James Tunstead Burtchaell is a Catholic priest and professor of theology at the University of Notre Dame, where he has served on the faculty since 1966. He first decided to write *Rachel Weeping*, the sixth of his books,

in 1976 and completed the title essay in August 1978. This essay is the only one in the book containing quotations from *Pregnant by Mistake.* Burtchaell maintains that the purpose of *Rachel Weeping* was to critique the published accounts of "abortion veterans," and that the book was aimed at the relatively small group of people interested in the public debate on abortion. He drew upon two primary sources in the title essay: *Pregnant by Mistake* and *The Ambivalence of Abortion* by Linda Bird Francke. Burtchaell offered a general characterization of Maxtone-Graham's book in his essay and mentioned the author's name. When he quoted from *Pregnant by Mistake,* he usually credited the source.

In the first few pages of his essay, Burtchaell explained that he regarded Maxtone-Graham's interviews as helpful source material, but that his own intention was to move beyond anecdotal reflection and offer a framework for analysis of the women's experiences.[3] In a deposition, Burtchaell said he considered paraphrasing from the interviews, but felt "it [was] essential for the credibility of my essay that the words of abortion vet-

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[3] Burtchaell explained the purpose of the essay at the outset:

> What makes these two books helpful is that both authors have let the women and men unfold their personal experience of abortion in all its confusion and hurt and courage and isolation. Their stories are rich and varied enough to sustain inquiry beyond (and sometimes athwart) what the interviewers say by way of summary. . . .
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> * * *
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> What Francke and Maxtone-Graham do not offer is any systematic reflection on what their interviewees have told them. Had they undertaken such an analysis, they would have seen emerging—from the veterans of the abortion experience—a profoundly unsettling story. Their documentation of the abortion experience is strong evidence—stronger in some sense than the indictments of antiabortionists—against the portrayal of abortion by its advocates.

Rachel Weeping at 2-3.

erans themselves appear." He also decided that, as a Catholic priest, conducting his own interviews would pose credibility problems and that his book would be perceived as fairer if he relied on interviews conducted by those who sympathize with the "pro-choice" view of abortion.

The first essay in *Rachel Weeping* was approximately 37,000 words long, and about 7,000 of these were direct quotations from the interviews in *Pregnant by Mistake.* Burtchaell's book contains 325 pages of text, and the title essay filled 60 pages. The district court found that *Rachel Weeping* includes 4.3 percent of the words in *Pregnant by Mistake.*

3. *Denial of Permission to Quote*

Burtchaell first requested permission to quote from *Pregnant by Mistake* "beyond the usual 500 or 1,000 word limit" in a letter to Liveright dated August 17, 1978. He sent the letter shortly after completing the first *Rachel Weeping* essay. When he received no reply to the letter, Burtchaell telephoned Liveright and was told that detailed production and financial information would have to be provided before his request could be considered. The next communication was in June 1981, when Burtchaell furnished the information and again requested permission, stating that he wished to quote about 5,000 words. In August 1981, Liveright asked Burtchaell to supply a copy of the essay for Maxtone-Graham to examine, and he did so. On November 4, 1981, Mary Ryan, an employee of Liveright, telephoned Burtchaell to inform him that Maxtone-Graham opposed granting permission and that Liveright would honor her request.

On November 6, 1981, Burtchaell wrote directly to Maxtone-Graham through Liveright, setting forth his predicament and urging her to reconsider. He explained to her that he had undertaken an analytical work, and thought it natural for him to comment on her essentially

reportorial book.[4] By letter dated December 7, 1981, Maxtone-Graham once again denied permission. She explained that the interviewees "told their stories in order to further understanding of the Pro-Choice view," and that she promised to honor their wishes. After consulting counsel, Burtchaell and Andrews & McMeel, the hardcover publisher, decided to proceed with publication of *Rachel Weeping* as written. The book was published on April 1, 1982, and Harper & Row produced a softcover edition in 1984.

Maxtone-Graham makes several arguments on appeal in her attempt to demonstrate that the grant of summary judgment in favor of defendants was improper. First, she alleges that Burtchaell made numerous errors in quoting from her book. She concedes that many of the mistakes were trivial, but she also argues that Burtchaell misled his readers by quoting women describing their experiences with adoption as if they were discussing abortion. These errors, she maintains, rob the work of scholarly quality and make Burtchaell's purpose in quoting from *Pregnant by Mistake* suspect. Among her other claims is that the quantum of use was excessive and that the infringement harmed her economic interests. Maxtone-Graham also maintains that Burtchaell acted unfairly by first seeking permission and then proceeding to

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[4] In his letter to Maxtone-Graham, dated November 6, 1981, Burtchaell wrote:

> The method of your book was essentially reportorial. You interviewed well, gave the people their say, and presented it in print as they had explained themselves. For another writer to come along afterwards and offer comments on the interviews seems to be not only acceptable but desirable. I am not contradicting your analysis, because you did not wish to do that kind of book. In fact, you would not have published the interviews had you not considered them challenging and thoughtful. It seems to me that an analysis of them, and a comparison with the Francke material, is a very natural sequel to your work, and one that you would welcome.

quote from the interviews after permission had been denied. Finally, she argues that there is a real issue concerning her motivation in denying permission. We shall return to these contentions momentarily.

B. SUMMARY JUDGMENT AND FAIR USE

The general principles that this court has developed in regard to summary judgment, of course, apply with equal vigor to the fair use determination. We have said repeatedly that on a motion for summary judgment

> the court cannot try issues of fact; . . . it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, . . . with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute . . . .

George C. Frey Ready-Mixed Concrete, Inc. v. *Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 555 (2d Cir. 1977) (quoting *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)). Because the fair use question is so highly dependent on the particular facts of each case, courts generally, including this court, have usually found it appropriate to allow the issue to proceed to trial. *DC Comics, Inc.* v. *Reel Fantasy, Inc.*, 696 F.2d 24, 27-28 (2d Cir. 1982); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1068-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). In *DC Comics*, for example, we held:

> The fair use defense turns not on hard and fast rules but rather on "an examination of the facts in each case." . . . The four factors listed in Section 107 raise essentially factual issues and, as the district court correctly noted, are normally questions for the jury.

696 F.2d at 28.

This court, however, has never suggested the adoption of a *per se* rule granting a plaintiff in a copyright infringement case immunity from the perils of Rule 56 when a defendant interposes the defense of fair use.[5] Nor do we feel that movement toward such a rule would be defensible in terms of precedent and good sense. Courts in this Circuit have approved the resolution of the fair use question at the summary judgment stage on several occasions. *See, e.g., Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (summary judgment granted for defendant on fair use defense in view of public interest behind defendant's use of copyrighted materials and failure of plaintiff to show injury). Frequently, more complete development of the record will be necessary before a ruling can be made, but in other cases, the fair use defense will be sustainable as a matter of law. "[T]he mere fact that a determination of the fair use question requires an examination of the specific facts of each case does not necessarily mean that in each case involving fair use there are factual issues *to be tried.*" *Meeropol* v. *Nizer*, 417 F. Supp. 1201, 1208 (S.D.N.Y. 1976), *rev'd in part on other grounds*, 560

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[5] The days of *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946) are behind us. In *Arnstein*, Judge Frank declined to grant summary judgment although defendants had demonstrated that plaintiff's claim was completely devoid of merit. In *Heyman*, we signalled a new direction in our treatment of summary judgment:

> Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most extraordinary circumstances, *see, e.g., Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946), that trend has long since been jettisoned in favor of an approach more in keeping with the spirit of Rule 56....

524 F.2d at 1319. *See also, Williams* v. *McAllister Brothers, Inc.*, 534 F.2d 19 (2d Cir. 1976); *United States* v. *Matheson*, 532 F.2d 809 (2d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). Recently, in granting summary judgment on the grounds of fair use, one court observed that

> the essential character of the fair use doctrine as an "equitable rule of reason," *see Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 792, 78 L.Ed.2d 574 (1984), makes it all the more appropriate for the court itself to decide whether the fair use defense applies when the historical facts underlying each of the four factors are not disputed.

Hustler Magazine, Inc. v. *Moral Majority, Inc.*, 606 F. Supp. 1526, 1532 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986).

Admittedly, the fair use determination often requires a complex and subtle evaluation of numerous mixed issues of fact and law. When the law requires a judgment for defendant, however, the difficulty of the fair use question is not a valid reason to shy away from summary judgment. In the case before us, the parties frequently offer different *characterizations* of the facts, but generally do not seriously dispute the relevant sequence of events preceding the controversy. The distinction between the portrayal of the facts and the facts themselves is subtle—some might say elusive—but without it the summary judgment tool would be rendered a nullity. Where facts in the instant case are in dispute, they would not affect the ultimate decision on the fair use question even if resolved in plaintiff's favor.

C. THE FAIR USE DEFENSE

The roots of what we now know as "fair use" are firmly planted in the early English common law, where the defense was known as "abridgment." One of the earliest cases to raise the issue was *Gyles* v. *Wilcox*, 2 Atk. 141 (1740) (No. 130), a decision upon a bill for

an injunction to stay the publication of a legal treatise. Lord Chancellor Hardwicke evaluated the defense of abridgment:

> Where books are colourably shortened only, they are undoubtedly within the meaning of the [copyright act], and are a mere evasion of the statute, and cannot be called an abridgment.
>
> But this must not be carried so far as to restrain persons from making a real and fair abridgment; for abridgments may, with great propriety, be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.

Id. at 143. From the earliest days of the doctrine, courts have recognized that when a second author uses another's protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer.

Fair use made its debut in American law with Justice Story's opinion in *Folsom* v. *Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).[6] *Folsom* involved a dispute over two biographical works about George Washington. The following passage is probably the most frequently cited one from Justice Story's discussion:

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

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[6] Actually, many of the issues addressed in *Folsom* were anticipated by Justice Story's opinion in *Gray* v. *Russell*, 10 F.Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).

Id. at 348. He framed his analysis in terms of two extremes. At one extreme was the studied evasion, in which "the whole substance of one work has been copied from another, with slight omissions and formal differences only. . . ." *Id.* at 344. At the other extreme was the use of verbatim portions of an earlier work to review or criticize. Justice Story wrote of this type of use:

> [N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Id. at 344-45.

As Justice Story observed, however, many uses would fall somewhere in between the two extremes. To evaluate cases falling in the gray area, he proposed an inquiry into the infringer's creative effort. In order to have a lawful abridgment, he said,

> [t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.

Id. at 345.

D. THE FOUR-PART INQUIRY OF SECTION 107

It is remarkable how much of the flavor of Justice Story's analysis remains intact in Section 107 of the Copyright Act of 1976. In enacting the legislation, Congress noted that its purpose was to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong.,

2d Sess. 66 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5680 ("House Report"); S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). At the same time, however, the legislature expressed its intention to give courts the freedom to adapt the doctrine to particular situations on a case-by-case basis, in light of changing technology. 17 U.S.C. Sec. 107 reads as follows:

> Sec. 107. *Limitations on exclusive rights: Fair use*
>
> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The factors listed in the statute are not intended to be exclusive: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." House Report at 65, *quoted in Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 105 S. Ct. 2218, 2231. They are, however, particularly relevant to the fair use question. We address each factor separately.

1. *Purpose and Character of Use*

The fair use provision of the Copyright Act expressly mentions "criticism" and "comment" as favored under the statute, and we think it indisputable that Burtchaell employed the material from *Pregnant by Mistake* for just such purposes. Certainly, *Rachel Weeping* is not merely the product of "the facile use of the scissors," to borrow Justice Story's phrase in *Folsom*. Rather, Burtchaell's work takes portions of the free form interviews and organizes them into a topical framework to make the case against abortion. One need not agree with the merit, methodology or conclusions of *Rachel Weeping* to recognize that Burtchaell applied substantial intellectual labor to the verbatim quotations, continually offering his own insights and opinions. As the district court found, Burtchaell drew upon published primary sources "to write persuasively and without arousing the suspicion of the reader . . . ." We also agree with Judge Brieant that "[a]n objective reader of *Rachel Weeping* would never confuse that work with the original *Pregnant by Mistake*, nor find that its author intended to supplant that work in the marketplace with his own."

a. *Commission of Error*

Maxtone-Graham argues, however, that Burtchaell's scholarly purpose is contradicted by inaccuracies that riddle his use of the quotations. She alleges that *Rachel Weeping* contains scores of minor mistakes involving capitalization, punctuation and so forth, and dozens more serious errors in which statements were taken out of context or distorted.[7] The district court failed to consider

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[7] Maxtone-Graham alleges that on at least ten separate occasions, *Rachel Weeping* quoted the women as though they were discussing abortion, when in reality they were discussing adoption. She has submitted to the Court a detailed list of more than 50 alleged errors

the element of error, but after comparing the two books, we conclude that many of appellant's charges are well-founded—especially those relating to the muddling of adoption and abortion experiences. Burtchaell's scholarship clearly leaves something to be desired, and it is equally unfortunate that the numerous inaccuracies in *Rachel Weeping* escaped the editors' attention.

The commission of errors in borrowing copyrighted material is a proper ingredient to consider in making the

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made by Burtchaell, and she contends there are numerous others. The following errors are representative of those alleged by appellant:

> At page 9 of *Rachel Weeping*, the quotation from *Pregnant by Mistake*, at pages 53-54, is inaccurate (a) as the quotation does not concern difficulty in talking to a father about being pregnant but rather about difficulty in bringing an illegitimate baby home to the woman's parents; (b) because the quoting changes words; (c) because words omitted from the quote are not noted; and (d) because Betsy states at page 49 of *Pregnant by Mistake* that she could have told her parents about abortion.
>
> * * *
>
> At page 20 of *Rachel Weeping*, the quote from *Pregnant by Mistake*, page 104, is quoted out of context because it does not pertain to reasons for abortion but rather to an explanation of not later regretting having an abortion.
>
> * * *
>
> At pages 42-43 of *Rachel Weeping*, the quote from *Pregnant by Mistake*, pages 420-422, is not in answer to a question about counseling, as stated in *Rachel Weeping*, but rather in answer to a question about relinquishing a child for adoption.
>
> * * *
>
> At page 43 of *Rachel Weeping*, the quotes from *Pregnant by Mistake*, pages 420-422, are quoted out of order without an indication that they have been reordered.
>
> * * *
>
> The statement at page 6 of *Rachel Weeping* that only two interviewees did not choose abortion is a half-truth, as three other women interviewed in *Pregnant by Mistake* had both abortion and adoption experiences.

fair use determination. 560 F.2d at 1071. It is, however, but one of many factors. In view of our evaluation of the other fair use elements, we conclude that the errors in *Rachel Weeping* do not place the work beyond the pale of fair use. In *Gyles* v. *Wilcox*, the court noted that an otherwise "fair abridgment" might sometimes be "prejudicial, by mistaking and curtailing the sense of an author." 2 Atk. at 143. Furthermore, as a judicial body, we consider it highly undesirable to hinge a legal determination solely on the relative truth or accuracy of statements made in the context of debate on a highly volatile social issue. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-83 (1964). Nor do we think it wise to give much legal relevance to whether the allegedly infringing work may be labeled "scholarly" or "dogmatic," for the dogma of one individual may be the original scholarship of another. Only where the distortions were so deliberate, and so misrepresentative of the original work that no reasonable person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim. The errors in *Rachel Weeping* do not cross that threshold.

b. *Commercial Use*

The Supreme Court recently addressed the question of fair use in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 447-55 (1984) (time-shifting by owners of home video tape recorders constitutes fair use) and in *Harper & Row*, *supra* (magazine's appropriation of right of first publication of former President Ford's unpublished manuscript not a fair use). These cases include discussion of how a commercial use affects the fair use inquiry. Maxtone-Graham maintains that *Sony Corp.* and *Harper & Row* require judgment against Burtchaell. We address the Supreme Court's recent pronouncements to show why appellant's suggestion that any income-producing use is unfair virtually by definition falls wide of the mark. In *Sony Corp.*, the Court stated:

> *Although not conclusive*, the first factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. . . . [A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.

464 U.S. at 448-49, 451 (emphasis added). Appellant makes much of the last sentence, but we do not read it as altering the traditional multi-factor fair use inquiry. Indeed, the Court relied on a House report which states that the statutory language requiring consideration of "whether such use is of a commercial nature or is for nonprofit educational purposes" was

> not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

464 U.S. at 449 n.32 (quoting House Report at 66). This understanding was reflected in *Harper & Row*, in which the Court noted: "The fact that a publication was commercial as opposed to non-profit is a separate factor that *tends to* weigh against a finding of fair use." 105 S.Ct. at 2231 (emphasis added). Only an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened significance to the element of commerciality.

It is undisputed that Burtchaell was paid for his efforts and that his publishers were not motivated by purely charitable intentions. But the inquiry does not end there. We do not read Section 107(1) as requiring

us to make a clear-cut choice between two polar characterizations, "commercial" and "non-profit." Were that the case, fair use would be virtually obliterated, for "[a]ll publications presumably are operated for profit . . . ." *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1st Dept. 1947), *quoted in Rosemont Enterprises*, 366 F.2d at 307. The commercial nature of a use is a matter of degree, not an absolute, and we find that the educational elements of *Rachel Weeping* far outweigh the commercial aspects of the book. While *Rachel Weeping* involved some commercial aspects, it was first and foremost an essay expressing a certain point of view on the abortion issue. With sales of 6,000 copies, it was hardly a commercial blockbuster and, by all indications, was never intended as such. Of course, even a minimal level of commercial use weighs against a finding of fair use, but whether it affects the ultimate determination depends on the totality of factors.

2. *The Nature of the Copyrighted Work*

The second factor to be considered is the nature of *Pregnant by Mistake*. As we have noted, the book is a collection of verbatim interviews and, in the district court's words, "essentially reportorial in nature." We agree with Judge Brieant, however, that *Pregnant by Mistake* cannot be characterized as the product of mere "diligence," like the index in *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977). *Pregnant by Mistake*, like all interviews, contains elements of creative journalistic effort. "Creation of a nonfiction work, even a compilation of pure fact, entails originality." *Harper & Row*, 105 S. Ct. at 2224. Nevertheless, Maxtone-Graham's book was essentially factual in nature, and, as the district court correctly noted, subsequent authors may rely more heavily on such works. As we have said in another context:

> Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. . . . This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so "that the world may not be deprived of improvements, or the progress of the arts be retarded."

Rosemont Enterprises, 366 F.2d at 307 (quoting *Sayre* v. *Moore*, 105 Eng. Rep. 138, 139 (K.B. 1801)). Like the biography, the interview is an invaluable source of material for social scientists, and later use of verbatim quotations within reason is both foreseeable and desirable.

3. *The Volume of Quotation*.

We next turn to the quantitative assessment of the amount and substantiality of the excerpts in relation to the copyrighted work as a whole. There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use. In some instances, copying a work wholesale has been held to be fair use, *Sony Corp.*; *Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd* (per curiam), 420 U.S. 376 (1975), while in other cases taking only a tiny portion of the original work has been held unfair. Questions of fair use may turn on qualitative assessments. "One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity." *Bramwell* v. *Halcomb*, 3 My. & Cr. (Ch.) 736, 738 (1837). In *Harper & Row*, the Supreme Court found that although the words quoted were an insubstantial portion of former President Ford's manuscript, "the Nation took what was essentially the heart of the book." 105 S. Ct. at 2233 (quoting 557

F. Supp., at 1072). *See Meeropol* v. *Nizer*, 560 F.2d 1071 (copyrighted letters comprised less than one percent of infringing work but were featured prominently in promotional materials); *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black Inc.* v. *Columbia Broadcasting Systems, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (jury could have found that taking 55 seconds of one hour, 29 minute film was qualitatively substantial), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982).

We agree with the district court that Burtchaell's inclusion of 4.3 percent of the words in *Pregnant by Mistake* in his own book is not incompatible with a finding of fair use. Burtchaell testified that he relied upon the verbatim quotations to make his own work more persuasive and because conducting his own interviews would have been impractical because he is a Catholic priest. Nor can it be said that Burtchaell took the heart of *Pregnant by Mistake*, since Maxtone-Graham's book consists of narratives by 17 women, and has no identifiable core that could be appropriated.

4. *Effect on the Market*

The final factor that we are required to consider is "the effect of the use upon the potential market for or value of the copyrighted work." The Supreme Court recently referred to the impact on the market as "undoubtedly the single most important element of fair use." *Harper & Row*, 105 S. Ct. 2234. The Court also had occasion to comment upon the market effect in *Sony Corp.* It said:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a pre-

> ponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

464 U.S. at 451. Curiously, however, this bifurcated analysis was not employed by the Court when, only a year later, the issue of fair use resurfaced in *Harper & Row*. Despite the Court's finding that the Nation's stated purpose in publishing the excerpts was to scoop the forthcoming extracts in Time, the Court made no presumption of harm. Instead, it focused its inquiry on *actual* damages and assessed the likelihood of future harm. The Court held that "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'" 105 S. Ct. at 2234-35 (quoting *Sony Corp.*, 464 U.S. at 451). Harm to derivative works must be taken into account, *see Meeropol* v. *Nizer*, 560 F.2d at 1070; *Roy Export* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. at 1145-46, as must any effect on the value of adaptation and serialization rights. 3 Nimmer Sec. 13.05(B).

In view of our conclusion that the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects, it is not clear that the dicta from *Sony Corp.* regarding the presumption of market harm governs here. Fortunately, we need not settle that issue here, for whether we presume harm, or search for proof of it, it is abundantly clear that *Rachel Weeping* poses no more than an insignificant threat of economic damage to Maxtone-Graham.[8] Although she has uncrystallized

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[8] We also note that *Pregnant by Mistake* was out of print when *Rachel Weeping* was published. While this factor is not essential to our affirmance of the district court's finding of fair use, it certainly supports our determination. The legislative reports have provided some guidance on this issue:

plans to publish a small second edition to satisfy requests for the book, *Rachel Weeping* has not affected these plans. Indeed, it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests because a small portion of the work was used in an essay sharply critical of abortion. This conclusion is supported by our finding that the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats. Moreover, it is not beyond the realm of possibility that Burtchaell's book might stimulate further interest in *Pregnant by Mistake*. Nor do we believe Maxtone-Graham can credibly argue that the use of the quotations has harmed potential markets for her work. She is unable to point to a single piece of evidence portending future harm, and the fact that *Pregnant by Mistake* was published a full decade before the appearance of *Rachel Weeping* makes any such claim far too speculative to sustain upon mere allegation.

5. *Other Factors*

The additional points raised by Maxtone-Graham do not affect our analysis of the fair use question. Although bad faith by the user of copyrighted material suggests unfairness, Burtchaell's decision to publish despite Maxtone-Graham's denial of permission does not deserve that characterization. Unlike *Harper & Row*, where materials were purloined and portions subsequently published, Burtchaell obtained *Pregnant by Mis-*

A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is "out of print" and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, ...

S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1965); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 67 (1976).

take through legitimate channels and made repeated attempts to obtain permission to quote from it. He was willing to pay the customary price, and, in fact, did so for the rights to quote from *The Ambivalence of Abortion.* Burtchaell should not be penalized for erring on the side of safety.

Finally, appellant argues that there is a material dispute concerning her purpose in withholding permission. She maintains that she was honoring her pledge to the interviewees, while the district court suggests that she was engaging in a form of content-based censorship. We accept her version of the facts, but also note that the issue is, at best, marginally relevant to our inquiry.

E. CONCLUSION

We find no genuine dispute on material issues of fact in this case, and conclude from our evaluation of the factors that the fair use defense was properly sustained as a matter of law. Burtchaell's use of *Pregnant by Mistake* was precisely the type of criticism of or comment on copyrighted materials anticipated by Section 107. The two books treated the same topic but served dissimilar functions, and it can hardly be said that *Rachel Weeping* emerged from "the facile use of the scissors" or supplanted *Pregnant by Mistake.* Burtchaell did portray some of the excerpts in a misleading light, but the errors alone are not egregious enough to invalidate the use. The commercial elements of the use were relatively minor, and appellant was unable to advance a colorable case demonstrating harm to the market for the copyrighted work. In addition, *Pregnant by Mistake* was largely factual, and was out of print when *Rachel Weeping* was published. Finally, borrowing 4.3 percent of the words of *Pregnant by Mistake* was not unfair.

Accordingly, we affirm the district court's grant of summary judgment in favor of defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1650—August Term, 1986

(Argued September 11, 1986 Decided October 15, 1986)

Docket No. 86-7349

KATRINA MAXTONE-GRAHAM,
Plaintiff-Appellant,

—against—

JAMES TUNSTEAD BURTCHAELL, ANDREWS & MCMEEL, INC. and HARPER & ROW, PUBLISHERS, INC.,
Defendants-Appellees.

Before: KAUFMAN, WINTER and PRATT, *Circuit Judges.*

Maxtone-Graham appeals from a judgment entered on an order of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge*, granting defendants' motion for summary judgment in a copyright infringement action based on the defense of fair use.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 1058-CLB

KATRINA MAXTONE-GRAHAM,
Plaintiff,

—against—

JAMES TUNSTEAD BURTCHAELL, ANDREWS & MCMEEL, INC. and HARPER & ROW PUBLISHERS, INC.,
Defendants.

[Filed April 4, 1986]

MEMORANDUM & ORDER

Brieant, J.

Plaintiff, Katrina Maxtone-Graham brought this complaint against Rev. James Tunstead Burtchaell, Andrews [&] McMeel, Inc., and Harper & Row Publishers, Inc., for copyright infringement. By motions fully submitted November 14, 1985, Defendants have moved for summary judgment in their favor, and plaintiff has moved for summary judgment in her favor on the issue of liability.

In 1971 and 1972 Ms. Maxtone-Graham conducted a series of interviews with seventeen women who responded to her invitation. Each of these women discussed with Ms. Maxtone-Graham on a tape recorder her personal experiences and reactions after having had an unwanted pregnancy. All but four of them had undergone abortions. Each interviewee signed an agree-

ment granting and releasing her rights and interest in the interview to Ms. Maxtone-Graham (Ex. C. to Defendant's Memorandum). These transfer agreements have not, however, been recorded.

After editing the transcripts of her interviews, Ms. Maxtone-Graham compiled them into a book entitled, *Pregnant by Mistake.* Liveright published the book in August 1973. Before it went out of print, *Pregnant by Mistake* sold approximately 2,300 copies, although almost 2,000 of them were sold in the first four months following publication.

In 1976 Rev. Burtchaell, a Roman Catholic priest and a Professor of Theology at the University of Notre Dame, decided to compose a set of essays on the subject and published them as a book entitled, *Rachel Weeping* [1]. In his title essay Rev. Burtchaell presented and commented upon information from *Pregnant by Mistake* and another similar work, *The Ambivalence of Abortion* by Linda Bird Francke. Rev. Burtchaell quoted both books extensively in the essay, although with attribution. Approximately 7,000 of the 37,000 words in the first essay are direct quotations from the interviews in Ms. Maxtone-Graham's book. The first essay represents 60 pages out of a total of 325 pages of text in *Rachel Weeping.*

Rev. Burtchaell wrote to the publishers of both *Pregnant by Mistake* and *The Ambivalence of Abortion* for permission to quote from the works. Random House, Inc., publisher of the latter book, granted that permission in exchange for a $575 payment. Despite several

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[1] The title refers to Herod who "sent forth, and slew all the children that were in Bethlehem, and in all the coasts thereof, from two years old and under. . . . [t]hen was fulfilled that which was spoken by Jeremy the Prophet, saying, In Rama was there a voice heard, lamentation and weeping, and great mourning, Rachel weeping for her children, and would not be comforted because they are not." Matt. 2:16, 18. See also Jer. 31:15.

letters and telephone calls to Liveright and its permissions editor, Ms. Mary Ryan, Rev. Burtchaell received no reply until August 1981. At that time Ms. Ryan asked Rev. Burtchaell to forward copy so that she could review the book. Rev. Burtchaell complied with her request. Three months later, in response to a telephone call from Rev. Burtchaell, Ms. Ryan telephoned him to report that Ms. Maxtone-Graham opposed granting the permission.

Rev. Burtchaell then wrote directly to Ms. Maxtone-Graham in an effort to persuade her to grant permission. In reply, Ms. Maxtone-Graham explained her refusal by writing that "[t]he women I interviewed told their stories in order to further understanding of the Pro-Choice view. They believed—and expressly stated—that their material was not be used for any other purpose. I promised to honor their wishes." Exhibit J to Defendants' Memorandum. Harper & Row published *Rachel Weeping* in April 1982, after advising Rev. Burtchaell that its legal counsel believed that his use of the quotations constituted "Fair Use" of the plaintiff's work.

Defendants have moved for summary judgment on the following two grounds: First, that Ms. Maxtone-Graham's failure to record the transfer agreements bars this action; and second, that Rev. Burtchaell's use of the quotations did not go beyond the amount permitted by the "Fair Use" doctrine.

Jurisdiction

Rev. Burtchaell quoted only the interviewees' words and not Ms. Maxtone-Graham's. She does not claim, therefore, that she has her own copyright interest in the portions used by Rev. Burtchaell. Nor can she make that claim. Courts have consistently held that "the use of conversations attributed to other persons cannot be a borrowing of copyrighted material, because of the Act's requirement, 17 U.S.C. § 102(a), that an author's work

be his own and not originate in others." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 205 (2d Cir. 1984) *rev'd on other grounds*, 105 S. Ct. 2218 (1985). She claims instead that she obtained a copyright in the words of the interviewees in her book as a result of written transfers. Defendants argue that the Copyright Act of 1976 requires her to record these transfers as a prerequisite to her suit. The relevant portion of the Act provides that:

> No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation. 17 U.S.C. § 205(d)

In 1973, when Ms. Maxtone-Graham published her book, a prior version of the Copyright Act was in effect. At that time, the Act did not require her to record the transfers to protect her copyright interest in them. *See New Fiction Publishing Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915). Ms. Maxtone-Graham claims that she would not have published the book if the copyright law had then required her to record each transfer agreement. This is because the interviewees, although they strongly support elective abortion, have, at the same time, insisted on keeping their identities secret; recordation of the transfer agreements would deny this promised anonymity because their names would be on file in the United States Copyright Office as a public record.

Defendants interpret 17 U.S.C. § 301(a), enacted as part of the 1976 Copyright Act as having the effect of making the Old Copyright Act provisions inapplicable to suits brought under the 1976 Act. Section 301(a) provides that:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished; are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

As the final sentence of this section suggests, and the Committee Report confirms, Congress included this provision to limit pre-existing *state* copyright protection schemes, and to make clear their intention to create a single Federal system for copyright protection. Thus, this section was included and framed in this manner "so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." Notes of Committee on the Judiciary, House Report cited in 17 U.S.C.A. § 301, at 271 (1977).

Contrary to defendants' assertions, § 301(a) does not preclude the application of the prior Federal copyright laws where appropriate to the case. Professor Nimmer has explained that "[t]he *ownership* of rights asserted after January 1, 1978 will often turn on the validity of grants executed pre-1978." 3 Nimmer, The Law of Copyright, § 10.03[B] at 10-37 (emphasis added). Defendants do not assert that Ms. Maxtone-Graham failed to obtain the ownership of the rights. Rather they insist that this Court may not exercise jurisdiction of her claim unless and until she records the transfer agreements, something she cannot do without breaching her promise of anonymity given to the persons interviewed.

She made this promise at a time when such a promise could be honored without rendering her copyright unenforceable.

Federal Courts have consistently required plaintiffs to record pre-1978 transfers before bringing infringement complaints. *See, e.g., Nation's Choice Vitamin Co., Inc. v. General Mills, Inc.*, 526 F. Supp. 1014, 1017 (S.D.N.Y. 1981). Plaintiffs have realized no hardship because of this requirement. They are permitted to record the transfers and subsequently amend their complaint or refile the action. *See Northern Songs, Ltd. v. Distinguished Productions*, 581 F. Supp. 638, 641 (S.D.N.Y. 1984). That solution is apparently unavailable in this context. Ms. Maxtone-Graham's right, obtained under the prior law, permitted private enforcement of her copyright without recordation. She relied on this arrangement when she negotiated the transfers with the interviewees. Her ability to obtain candid and forthcoming interviews, or any interviews at all, would have been greatly diminished if she could not have promised anonymity. Plaintiff expended a significant investment of time and effort in preparing *Pregnant by Mistake*, and she expected to earn a financial reward for her endeavors. Without the copyright protection, and the economic incentive it provides, she would not have written the book. Her book, like *Rachel Weeping*, is a serious and scholarly work intended to add to public knowledge and discourse involving a significant moral, social and political issue.

Congress could not have intended the 1976 Act to bar the rights of those who own works published and copyrighted validly under the earlier Act, and find themselves unable for practical reasons then unforeseeable, to record their prior transfers now. Defendants do not deny that the prior transfers exist. They were produced in pre-trial discovery with names deleted. Defendants are not prejudiced by failure to record, because they had

actual notice of these transfers. Accordingly, plaintiff's failure and her inability to record the transfers under the New Copyright Act will not bar her complaint under the special circumstances which exist here and preclude recordation.

Defense of Fair Use

This case highlights the apparent tension created by the coexistence of the Copyright Clause, which authorizes Congress to grant to authors "the exclusive right" to their "writings", U.S. Const. Art. I, § 8, Cl. 8, and the First Amendment to the United States Constitution. The Copyright laws protect an author's incentive to publish by granting him or her extensive control over the publication and republication of his or her original works. Occasionally, as in this case, this policy must yield to the right of persons to engage in full and free public discourse of ideas and issues protected by the First Amendment. To satisfy these First Amendment requirements, Courts have mitigated the chilling effect of copyright law upon free expression, as well as future creativity and scholarship, by developing two doctrines—the Defense of Fair Use (now codified in 17 U.S.C. § 107) and the so-called Ideas/Expression dichotomy. Courts apply the latter principle to "strike a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1984) *rev'd on other grounds*, 105 S. Ct. 2218 (1985), hereinafter, the *Nation* case.

In the *Nation* case, the Supreme Court purported to reject the view, at least in the factual context there presented, that the "scope of fair use is wider when the information conveyed relates to matters of high public concern." *Nation*, 105 S. Ct. at 2228. This apparently far ranging *dictum* must be recognized for what it is,

and limited by the context of that case. The *Nation* magazine had obtained the unpublished manuscript of former President Ford's memoirs, *A Time to Heal*, in a manner like unto larceny. Before *Time* magazine could publish excerpts which it had purchased, the *Nation* published its own article with excerpts, to the economic detriment of the author and publisher. The Supreme Court held that the *Nation*'s article was not a "fair use" within the meaning of 17 U.S.C. § 107. As the Court explained, "fair use analysis must always be tailored to the individual case." *Id.* at 2227. The Court found the right to first publication, the right at issue in that case, "inherently different" from other publication rights because its value comes from its exclusivity. *Id.* Once someone else has published the essentially same thing that right becomes meaningless. Consequently, the Court reasoned that continued activity of this sort would restrict rather than enhance public discourse and debate. At the same time, the Court reaffirmed the importance of "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.* at 2230. Accordingly, the *Nation* case at most stands for the proposition that First Amendment considerations will not bolster a fair use defense when plaintiff has quoted from an unpublished work; viewed as a whole the opinion does not support a conclusion which the quoted *dictum* appears to suggest. Public speech which is directly related to matters of high public concern *is* entitled to different consideration when the issue of fair use is presented. *See, e.g., Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) (holding that informational work may be more freely published under a fair use defense than those of a creative nature).

Whether Rev. Burtchaell's verbatim copying of the quotations from Ms. Maxtone-Graham's book was fair

use or not must therefore be determined by this Court according to the traditional equities which include First Amendment content related considerations.

Plaintiff asserts that defendants may not avail themselves of the equitable fair use defense because of bad faith on their part. She bases her claim of bad faith on two points: First, that defendants violated "the custom and usage of the publishing industry not to claim fair use after permission to quote copyrighted material has been denied." (Brief at 7); and second, that the amount that Rev. Burtchaell quoted in his first essay was so great that the Court must presume bad faith on his part.

Some publishing houses may, as Mr. Schmalzer of Liveright claimed in his deposition, choose not to publish excerpts when permission has been denied. Plaintiff's Memorandum, Ex. F. No such custom has been shown to be embraced by the publishing industry as a whole. Nor did Mr. Schmalzer in fact make such a broad claim. Ultimately, he conceded that it was only "a working policy" at some of the publishing houses at which he had worked. Such a custom or practice if granted any force in this Court would arrogate to publishers the absolute power to determine what constituted a "fair use" whenever a defendant first sought permission to quote. Since the doctrine of fair use is a legal doctrine having Constitutional implications, it cannot be subject to definition or restriction as a result of any such trade custom or practice, no matter how long continued. Accordingly, even if such a custom were shown to exist industry wide, and it has not been, it could have no legal force.

The quantity copied by a subsequent author will not, by itself, determine whether or not a use is "fair". As codified by Congress, the amount copied is only one of several factors that courts must examine when they assess the fairness of a use. Moreover, the House Report cautioned that "no generally applicable definition is pos-

sible and each case raising the question must be decided on its own facts." House Report at 65, in U.S. Code Cong. & Admin. News. at 5678 (1976).

Section 107 of the Act lists the following four factors as particularly relevant when assessing whether a use is "fair":

> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for a non-profit educational purpose; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

We examine each of these factors in turn.

Purpose and Character of the Use

Harper & Row published *Rachel Weeping* as a commercial venture. Although Rev. Burtchaell and perhaps Harper & Row viewed the work as scholarly and a contribution to the national debate on elective abortion, it was a "for profit" endeavor. Harper & Row paid Rev. Burtchaell a $5,000 advance and advertised the book nationally. An educational use rendered for profit amounts to a "commercial" use. That conclusion, however, does not negate a fair use determination. *Rosemont Enterprises Inc. v. Random House, Inc.*, 366 F.2d 303, 308 (2d Cir. 1966). Because commercial and scholarly or artistic elements are each present in any publication, our Court of Appeals has held that "whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes fair use." *Id.* at 307.

Rev. Burtchaell, who represents that he belongs to a religious order and has taken the vow of poverty, did

not author the essays with a primary purpose of financial gain. He could not have expected or intended to sell many more than the 6,000 copies of *Rachel Weeping* ultimately sold. The book was his attempt to make a nondogmatic scholarly argument on behalf of the Pro-Life viewpoint. In order to write persuasively and without arousing the suspicion of the reader, he felt obliged to quote, rather than paraphrase, the words of the so-called "abortion veterans" interviewed by plaintiff and Ms. Francke. His aim was not to save his own time, or to exploit plaintiff's efforts, but to analyze these personal accounts in the most effective and persuasive manner. Justice Story explained in *Folsom* v. *Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) that, "no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism." An objective reader of *Rachel Weeping* would never confuse that work with the original *Pregnant by Mistake*, nor find that its author intended to supplant that work in the marketplace with his own.

The Nature of the Copyrighted Work

Although both books were published for sale to the hardcover book buying public and, specifically, to those seriously interested in the issue of elective abortion, the similarity between them ends there. *Pregnant by Mistake* is essentially reportorial in nature. Defendants have attempted to characterize the book as the product of "mere diligence" like the index at issue in *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977). However, as the statement from the American Society of Journalists and Authors, Inc. submitted on the motion (Ex. B to Plaintiff's Brief) makes clear, interviewing and writing are not as simple as turning on a tape recorder. As journalism, *Pregnant by Mistake* is entitled to the same protection as any

copyrighted news story, biography or other collection of facts and the opinions of others than the collecting journalist.

Copyright law permits heavier reliance by later authors when the earlier work is essentially factual in nature. As our Court of Appeals has explained:

> "[b]iographies, of course are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so 'that the world may not be deprived of improvements, or the progress of the arts retarded.' *Sayre* v. *Moore*, 102 Eng. Rep. 138, 139 (K.B. 1801)." *Rosemont Enterprises* at 307.

Pregnant by Mistake is essentially a book of source material. The advancement of the social sciences and public discourse on an important issue is enhanced by permitting liberal, but fair, use of such materials.

Amount Quoted in Relation to the Copyrighted Work

Rachel Weeping includes 4.3% of the words in *Pregnant by Mistake*. In this context such verbatim repetition is not inconsistent with a finding of fair use. As explained above, Rev. Burtchaell believed, probably correctly, that he needed to present portions of these individual abortion experiences in the same words in order to critique them fairly. In light of his stated purpose of examining the reasons women choose abortion, 5% is not a level of quotation beyond the bounds of fair use.

Effect on the Potential Market

The effect of the use on the potential market for the copyrighted work "is undoubtedly the single most impor-

tant element of fair use." *Nation*, 105 S. Ct. at 2218. Professor Nimmer explains that "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D] at 1-87. This factor becomes even more important in the present context. If plaintiff cannot demonstrate that she has suffered any adverse economic impact, then the "free speech" considerations subsumed in the first two factors of the fair use analysis militate wholly in favor of the defendants.

Where a defendant's work performs a different function than a plaintiff's, then the use is not considered to be unfair. 3 Nimmer § 13.05[B] at 13-78. *Pregnant by Mistake* is a book of interviews. Although these are edited, the book offers no analysis. *Rachel Weeping* analyses and comments upon both Ms. Maxtone-Graham's book and the *Ambivalence of Abortion*; as such it complements, rather than supplements these earlier works. Because it serves a different function, Rev. Burtchaell's work has not had an adverse effect on the potential market for Ms. Maxtone-Graham's book.

Pregnant by Mistake "was going out of print" when *Rachel Weeping* was published in August 1982. Plaintiff's Memorandum at 26. Although going out of print does not terminate a copyright, it is an appropriate element to consider when assessing the impact on a copyrighted work's potential market. "If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it." *Nation*, 105 S. Ct. at 2227 (quoting from the Senate Report to the 1976 Copyright Act). Ms. Maxtone-Graham's book had essentially become "unavailable." Only 2,400 copies had been sold since its first publication in 1973, and only one copy had been sold since April, 1981. Thus, even if *Rachel Weeping* might have had some functional equivalency to *Pregnant by Mistake*, which it did not, the latter had no market to be harmed.

Conclusion

Defendants have proved on the motion, as a matter of indisputable fact, that Rev. Burtchaell made fair use of Ms. Maxtone-Graham's work and the interviews therein. Indeed, Ms. Maxtone-Graham has evidently objected to this use solely in an effort to limit further scholarship using her own scholarly investigation as a base or starting point, and she has done so simply because the views or opinions of the later work do not coincide with her own or those of her interviewees. Such an objection has no merit. Neither plaintiff nor her subjects can properly claim a right to stifle further discourse. Objection by a quoted author to the viewpoint espoused by the subsequent user is simply not relevant to an inquiry into the lawfulness of that use under the Fair Use doctrine.

For the foregoing reasons, Defendants' motion for summary judgment is granted, and plaintiff's motion is denied. The Clerk shall enter final judgment that all relief shall be denied.

So Ordered.

Dated: White Plains, New York
April 5, 1986

/s/ Charles L. Brieant
CHARLES L. BRIEANT
U.S.D.J.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-468

KATRINA MAXTONE-GRAHAM,
Applicant,

v.

JAMES TUNSTEAD BURTCHAELL, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including February 12, 1987.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 17th day of December, 1986.

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1330

In The
Supreme Court of the United States
October Term, 1986

KATRINA MAXTONE-GRAHAM,
Petitioner,
v.
JAMES T. BURTCHAELL, *et al.*,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 86-1330

In The

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KATRINA MAXTONE-GRAHAM,

Petitioner,

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JAMES T. BURTCHAELL, *et al.*,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents James T. Burtchaell, Andrews & McMeel, Inc., and Harper & Row, Publishers, Inc., respectfully oppose the petition for a writ of certiorari. This is a copyright infringement action arising out of the emotionally charged national debate on abortion. The district court granted respondents' motion for summary judgment based on the fair use defense, and the court of appeals affirmed.

The appellate decision in this case reflects a careful and reasoned application of the traditional fair use fac-

tors to the undisputed facts, and does not in any respect represent a departure from the guidelines established by this Court. Indeed, it is the *petitioner* who is attempting to goad the Court into an impractical and unrealistic interpretation of its prior decisions.

In summary, in 1973 the petitioner published *Pregnant by Mistake,* a book consisting entirely of the transcripts of interviews of women who had experienced unwanted pregnancy. In 1982, after *Pregnant by Mistake* had gone out of print, respondent Burtchaell (a Catholic priest and professor of Theology at Notre Dame) published *Rachel Weeping,* a scholarly analysis of the abortion issue from the pro-life standpoint. The scholarly analysis contained in *Rachel Weeping* was supported, in part, by fully attributed quotations from the evidence set forth in *Pregnant by Mistake.*

Petitioner, a prominent pro-choice advocate in the abortion debate, opposed any use of the *Pregnant by Mistake* evidence by opponents of abortion. However, as a scholar writing on the subject of abortion, Father Burtchaell was entitled to quote from this evidence, and at each level the lower courts have correctly concluded that such quotations constitute fair use, applying the traditional fair use factors as codified in section 107 of the Copyright Act. 17 U.S.C. § 107.

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STATEMENT OF FACTS

Pregnant by Mistake

In 1973 Ms. Maxtone-Graham authored a book entitled *Pregnant by Mistake.* The publisher was Liveright & Company of New York. The copyright in *Pregnant by Mistake* was registered on September 19, 1973. (5a)[1]

Pregnant by Mistake consists of the verbatim transcripts of interviews with seventeen women who explain their experiences after having an unwanted pregnancy. Most of these women chose to have abortions, and their stories are centered around their abortion experiences. (127a). All of the interviews were tape recorded and transcribed. (163-168a).

All of the passages in *Pregnant by Mistake* which are identified as quotes from the interviewed women are in fact the actual words used by those women. (173-174a).

Because her goal was to publish a verbatim transcript of the interviews, Maxtone-Graham followed a strictly mechanical editing process in the preparation of *Pregnant by Mistake,* eliminating from the transcripts only idle repetition and chatter, and changing the names of the interviewees to protect their anonymity. (171-172a; 175-178a).

From the day of its publication to the day it went out of print (i.e. from August 31, 1973 to March 31, 1982)

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[1]For purposes of clarity, references to the appendix in the court of appeals wil be made as follows: The page number will appear in parentheses, followed by the letter "a." Citations to the appendix which accompanies the Petition for Certiorari will be made as follows: "Pet. App.", followed by the page number as designated in the Appendix.

2,349 copies of *Pregnant by Mistake* were sold. During the last year of its publication, only one copy of *Pregnant by Mistake* was sold. (129-149a). No copies have been sold since March 1982.

The entire sales history of *Pregnant by Mistake* is as follows:

Period	*Copies Sold*
8/31/73 - 2/28/74	1,931
3/01/74 - 9/30/74	(57)
10/01/74 - 3/31/75	(65)
4/01/75 - 9/30/75	71
10/01/75 - 3/31/76	51
4/01/76 - 9/30/76	69
10/01/76 - 3/31/77	72
4/01/77 - 9/30/77	30
10/01/77 - 3/31/78	64
4/01/78 - 9/30/78	31
10/01/78 - 3/31/79	33
4/01/79 - 9/30/79	35
10/01/79 - 3/31/80	29
4/01/80 - 9/30/80	27
10/01/80 - 3/31/81	27
4/01/81 - 3/31/82	1
TOTAL SALES	2,349

On February 25, 1982, *Pregnant by Mistake* was either out of print or was about to go out of print. (179a). On or about February 25, 1982, Maxtone-Graham obtained from Liveright all publishing rights to *Pregnant by Mistake*. (Complaint, paragraph 10).

Ms. Maxtone-Graham owns a small publishing company and has considered publication of a second edition of *Pregnant by Mistake*, "when I get around to it."

(180a). The publication of *Rachel Weeping* in April 1982 has not impeded any plans for such a second edition. In fact, appellant's own personal priorities ("I have thank you notes to write first, and many, many other things . . .") have prevented publication of a second edition. (181a). If a second edition is published, it will be "a very small printing for people who have requested copies." (180a).

Father Burtchaell and Rachel Weeping

Father Burtchaell is a Catholic priest and a Professor of Theology at the University of Notre Dame. (334a). He has been a faculty member at Notre Dame since 1966.

Rachel Weeping is Father Burtchaell's sixth book. (186a). He first decided to write it in 1976. *Id.* Preparation of the first essay, which is the only one containing quotes from *Pregnant by Mistake,* was complete in August 1978. (193a).

In preparing the first essay contained in *Rachel Weeping,* Father Burtchaell intended "to give a serious analysis of the published accounts of abortion veterans." (189a). The work was intended for a limited and scholarly audience:

> "Granted the length and complexity of the book, I did not expect it would have a popular audience. I expected that people seriously interested in the public debate on abortion—who are relatively few in number —would find the book interesting."

(190a).

In preparing the first essay contained in *Rachel Weeping,* Father Burtchaell quoted from two primary

sources: *Pregnant by Mistake,* and *The Ambivalence of Abortion* by Linda Bird Francke. (126a). His preparation of the first draft of the essay reflects the classic critical analysis of a scholar:

> "First of all, I read attentatively the two books to which I make reference. I then noted recurring themes. I reread the books, identifying passages that bore on those themes. I sketched out on outline. I wrote the first draft longhand, revised it and typed it, thus creating what I call the first draft."

(187-188a).

This first essay is a critical analysis of and commentary upon the evidence assembled by Maxtone-Graham and Francke. At the outset, Father Burtchaell emphasizes the nature and purpose of the essay:

> "What one needs in the case of abortion is an extended visit to the villages, and that is available in Linda Bird Francke's book, *The Ambivalence of Abortion* (New York: Random House, 1978; hereinafter cited as F). After reading it one should pick up its natural supplement, *Pregnant by Mistake,* by Katrina Maxtone-Graham (New York: Liveright, 1973; hereinafter cited as G).
>
> Both books present interviews. Maxtone-Graham had extended conversations with seventeen women, before abortion on demand was legal nationally but after it was permitted in New York. Francke offers about seventy-five interviews. They are briefer, but more varied: with women, men, and couples; before, during, and as much as fifty years after the abortion experience. Both authors are explicitly sympathetic to abortion choice, and succeed in being relatively fair, inobtrusive interviewers."

* * *

> "What makes these two books helpful is that both authors have let the women and men unfold their personal experience of abortion in all its confusion and hurt and courage and isolation. Their stories are rich and varied enough to sustain inquiry beyond (and sometimes athwart) what the interviewers say by way of summary."
>
> * * *
>
> "What Francke and Maxtone-Graham do not offer is any systematic reflection on what their interviewees have told them. Had they undertaken such an analysis, they would have seen emerging—from the veterans of the abortion experience—a profoundly unsettling story. Their documentation of the abortion experience is strong evidence—stronger in some sense than the indictments of antiabortionists—against the portrayal of abortion by its advocates."

(126a at 2-3).

Father Burtchaell considered whether he should paraphrase, rather than quote directly from, the interviews in *Pregnant by Mistake* and *The Ambivalence of Abortion*, but he rejected this idea on scholarly grounds:

> "It was my observation that the literature in the abortion debate was highly contentious and often raised questions of credibility. I had encountered numerous third-party accounts of what other persons had said, which I either discovered or surmised were distorted. I considered it essential for the credibility of my essay that the words of abortion veterans themselves appear."

(201a).

Likewise, he rejected the idea of conducting his own interviews of abortion veterans:

> "I realized that as a Catholic priest I would myself encounter credibility problems. I have had considerable experience with abortion veterans, and I could have set out to do interviews myself. But I considered that it was fairer and likely to be perceived as fairer were I to use only interviews conducted by pro-choice interviewers."

(202a).

Quotations from *Pregnant by Mistake* represent 2.76% of *Rachel Weeping,* and *Rachel Weeping* quotes 4.3% of *Pregnant by Mistake.* (151-152a).[2] All quotations from *Pregnant by Mistake* are clearly cited and fully attributed in *Rachel Weeping.* (126a).

Father Burtchaell's Advance Request to Liveright

Upon completion of the first *Rachel Weeping* essay in August 1978, Father Burtchaell sought in good faith to obtain from Liveright permission to quote from *Pregnant by Mistake.* This request was first made in a letter dated August 17, 1978. (191-2a; 152a). At that time, the first essay of *Rachel Weeping* was complete and could have been reviewed by Liveright. (193a).

---

[2]Petitioner argues that quotations from *Pregnant by Mistake* constitute 19% of the "lead essay" of *Rachel Weeping.* (Pet. at 6). However, the "lead essay" has never been published separately from the entire book, and petitioner's comparison is crudely and unfairly structured to her best advantage. Likewise, petitioner incorrectly states that Father Burtchaell quoted the "heart" of *Pregnant by Mistake.* (Pet. at 6). Petitioner did not advance such a proposition in either the district court, or the appellate court. A simple review of *Pregnant by Mistake* reveals no identifiable core, and the court of appeals correctly so concluded. (Pet. App. at 20a). Petitioner is desperately contorting the record to bring herself closer to decisions such as *Harper & Row, Publishers, Inc. v. Nation Enterprises, infra.*

Father Burtchaell was told that he must furnish Liveright with detailed financial and production information before permission would be granted. (194a). He did so in June 1981 when the requested financial and production information was first available. (195a). Although he had, at the request of Liveright, submitted an advance copy of his book in early August 1981, he was informed for the first time in early November 1981 by Liveright that "Maxtone-Graham had some reluctance to Liveright granting the permission requested." (336a).

Subsequently, on November 4, 1981 Mary Ryan of Liveright telephoned Father Burtchaell and informed him that Maxtone-Graham "was opposed to" his having permission to quote from *Pregnant by Mistake,* "and that without her agreement, Liveright would not wish to grant" permission. (196a). Father Burtchaell responded:

> "I, once again, objected to having been entrapped in an impossible situation. I asked if I might speak with the author, and I was refused that. I then asked if I might correspond with her to make another appeal, and I was refused that. But then Ms. Ryan agreed that if I were to write through the press, she would agree to forward the letter to the author. I reminded her also, once again, of how long the book had proceeded in production. It was then that I wrote the letter of November 6."

(196a).

On November 6, 1981, Father Burtchaell sent a lengthy letter to Maxtone-Graham in care of Liveright. (155a). He outlined in detail the history of *Rachel Weeping*, and of his requests to Liveright. He attempted to persuade Maxtone-Graham that she should not oppose quotation of the

evidence in *Pregnant by Mistake*. He closed with the following:

> "The method of your book was essentially reportorial. You interviewed well, gave the people their say, and presented it in print as they had explained themselves. For another writer to come along afterwards and offer comment on the interviews seems to be not only acceptable but desirable. I am not contradicting your analysis, because you did not wish to do that kind of book. In fact, you would not have published the interviews had you not considered them challenging and thoughtful. It seems to me that an analysis of them, and a comparison with the Francke material, is a very natural sequel to your work, and one that you would welcome. That you and I may have diverging ethical judgments about abortion should not stand in the way of open, professional discourse on the subject.
>
> "So I appeal to you on two grounds. First, I have tried to write a serious and fair analysis of a subject on which you have published some evidence. Second, my publication schedule is such that your refusal at this late date seems very unreasonable. Had you asked to review my essay 39 months ago, I would have had options open that are no longer available now that I am two months from publication. I have acted in completely good faith. I assume that you have done the same, but had Liveright and you intended to deal with me in bad faith I do not know what you could have done to make things worse."

(155a).

Maxtone-Graham responded by letter to Father Burtchaell on December 7, 1981. She stated unequivocally that she was opposing permission in order to prevent the use

of portions of *Pregnant by Mistake* in any book that did not adhere to the "pro-choice" line. (158a).[3]

Father Burtchaell then consulted with his editor at Andrews & McMeel, Inc.:

> "I am sure that I reviewed the recent correspondence and my perplexity. She indicated that she would contact legal counsel. Another telephone conversation followed her communication with legal counsel in which she explained to me . . . without technicalities, what the Fair Use Doctrine was, and indicated that in the opinion of counsel I had firm ground to proceed even without permission; although we would have preferred to have received it, and to have paid an appropriate fee as had been the case with the other publisher, author, and book."

(197-198a).

Early in December, 1981, Father Burtchaell reviewed the page proofs for *Rachel Weeping* and returned them to Andrews & McMeel on December 9, 1981. (200a). *Rachel Weeping* was published on April 1, 1982. (200-201a).

———o———

[3]Maxtone-Graham now seeks to characterize her refusal as based upon alleged "misquotations" by Father Burtchaell. (Pet. at 5). This is a flat misstatement—her letter nowhere mentions or even implies "misquotations." (158a). The real reason for her refusal is clear and, until now, undisputed. She simply did not want Father Burtchaell to use any portion of *Pregnant by Mistake* to make arguments against abortion.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE COMMERCIAL USE FACTOR

Petitioner's first argument focuses on the appellate court's evaluation of "the purpose and character" of Father Burtchaell's quotation from *Pregnant by Mistake*. (Pet. at 12-18). This, of course, is one of the factors to be considered in the fair use analysis, and it includes an assessment of whether the "use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). It is the commercial element of section 107(1) which is the basis of petitioner's argument. She states that the court of appeals "unabashed[ly] refus[ed]" to recognize the presumption that a commercial use is not a fair use, and that it devised a "newfangled test," under which the issue is whether the commercial or the educational elements of a work predominate. (Pet. at 14-15).

Such hyperbole readily dissolves upon a brief examination of the appellate decision and the recent decisions of this Court. In *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49, 451 (1984), this Court held that "every commercial use of copyrighted material is presumptively an unfair exploitation," but specifically cautioned that this presumption is "not conclusive." In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) the Court quoted the above language, with the following specific proviso: "The fact that a publication was commercial as opposed to non-profit is a separate factor that *tends* to weigh against a finding of fair use." (Emphasis Supplied)

The court of appeals expressly recognizes and applies these guidelines: "Of course, even a minimal level of com-

mercial use weighs against a finding of fair use, but whether it affects the ultimate determination depends on the totality of factors." (Pet. App. at 18a). Further, the court recognizes the practical reality that "the commercial nature of a use is a matter of degree, not an absolute . . ." *Id.* At one end of the spectrum is the appropriation by a mass market national magazine of the right of first publication of a public figure's memoirs. At the other end of the spectrum is a scholar's quotation from an out of print book for use in a limited circulation treatise on abortion. Both uses have commercial aspects. However, in the former instance the commercial factors predominate, while in the latter commercial factors are clearly secondary.

The court of appeals recognizes this practical distinction, and refuses to adopt petitioner's attempt to impose a black-or-white, pigeonhole analysis of the fair use factors:

> "We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, "commercial" and "non-profit." Were that the case, fair use would be virtually obliterated, for "[a]ll publications presumably are operated for profit . . ." [Citation omitted.]

(Pet. App. at 18a). Thus, the court of appeals does not "construe *Sony* into oblivion," nor does it establish a "newfangled test." Rather, it recognizes *Sony's* rebuttable presumption regarding commercial uses, and it also recognizes *Sony's* cautionary language placing this presumption squarely into the context of the other fair use factors.

The appellate court also correctly observes that the commercial use presumption is only one part of the sec-

tion 107(1) analysis. In evaluating the first fair use factor, the Copyright Act calls for an assessment of "the purpose and character of the use, *including* whether the use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. 107(1). (Emphasis supplied). Thus, the court of appeals correctly assesses the nature of Father Burtchaell's work in the context of section 107(1): "While *Rachel Weeping* involved some commercial aspects, it was first and foremost an essay expressing a certain point of view on the abortion issue." (Pet. App. at 18a).

II.

THE COURT OF APPEALS CORRECTLY EVALUATED RACHEL WEEPING'S LACK OF EFFECT ON THE MARKET FOR PREGNANT BY MISTAKE

Petitioner's second point is that the court of appeals ignores *Sony's* presumption of future harm to the market for a work, when the allegedly infringing work is commercial in nature. (Pet. at 18-21). However, it is petitioner who has ignored the compelling evidence on this point. In short, this evidence was as follows:

a. *Pregnant by Mistake* was out of print before *Rachel Weeping* was published. (179a).

b. Petitioner's "thank you" notes were a more significant impediment than *Rachel Weeping* to a second edition of *Pregnant by Mistake*. (180-81a).

c. On its face, *Pregnant by Mistake* is reportorial in nature, as contrasted with *Rachel Weeping's* critical analysis. The books serve markedly different functions.

d. *Pregnant by Mistake* is avowedly pro-choice, while *Rachel Weeping* is avowedly pro-life. The books are directed to markedly different audiences.

In response to this evidence, petitioner offered *no* evidence whatsoever. This, of course, is fatal to a party opposing summary judgment. See, Wright, Miller & Kane, *Federal Pratice and Procedure 2d*, § 2739.

Recognizing this deficiency, petitioner's lawyers in this Court now offer the absurd speculation that *Rachel Weeping* could be seen by the public as a substitute for *Pregnant by Mistake*. (Pet. at 21). It is difficult to understand how this could be so, in light of the vastly different functions which the books serve, and in light of the vastly different markets to which they are directed. Moreover, petitioner made no effort whatsoever to present *evidence* in support of the dubious proposition which she now advances. Respondents offered clear evidence of the lack of market harm, and they thus overcame the *Sony* presumption.

The court of appeals questions whether the *Sony* presumption applies here, in light of its conclusion that "the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects . . . ." (Pet. App. at 21a). However, petitioner failed to counter the evidence of lack of market harm, and the court therefore saw no need to address the issue:

> "Fortunately, we need not settle that issue here, for whether we presume harm, or search for proof of it, it is abundantly clear that *Rachel Weeping* poses no more than an insignificant threat of economic damage to Maxtone-Graham."

(Pet. App. at 21a). The court then proceeded to catalog the evidence indicating no economic damage, noting that petitioner offered no countering evidence, and ruling the point in favor of respondents. (Pet. App. at 21-22a).

III.

THERE IS NO TRIABLE ISSUE OF FACT AS TO THE VOLUME OF QUOTATION

Petitioner's final point is that there remain genuine issues of material fact as to the volume of quotation, and as to the alleged "errors and distortions" contained in Father Burtchaell's work. (Pet. at 21-24). However, the facts as to the number of words quoted are undisputed (although petitioner crudely attempts to skew the percentage comparisons in her favor by carving out one essay in *Rachel Weeping* for comparison to her entire book). Moreover, even construing the allegations of "error and distortion" (which would not be unexpected in the emotionally charged abortion debate) in petitioner's favor, the appellate court correctly concludes that such "errors" do not foreclose the fair use defense, especially in light of the court's evaluation of the other fair use factors. (Pet. App. at 16a).

———o———

CONCLUSION

Petitioner has not demonstrated that this case presents issues worthy of review by this Court on certiorari. The decision of the court of appeals is entirely proper, and is fully in accord with this Court's decisions in *Sony* and *Harper & Row*.

The petition itself reveals why respondents prevailed in the district court and in the court of appeals—petitioner is attempting to overcome compelling evidence with nothing more than presumptions and speculation. This is not a case for certiorari.

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No. 86-1330

In the Supreme Court of the United States

OCTOBER TERM, 1986

KATRINA MAXTONE-GRAHAM, PETITIONER

v.

JAMES T. BURTCHAELL, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC. AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.

The American Society of Journalists and Authors, Inc. (ASJA) respectfully moves for leave to file the attached brief as amicus curiae in this case in support of the petitioner. The attorney for the petitioner has consented to the filing of this brief. The consent of the attorney for the respondents was requested but refused.

The ASJA is a private, nonprofit organization dedicated to encouraging high standards in nonfiction writing. Its membership consists of over 700 independent free-lance nonfiction writers throughout the United States. The members of the ASJA depend upon the copyright laws to protect their economic and artistic in-

terests in their original work from exploitation by subsequent users. Without these statutory safeguards, a writer's motivation to produce creative and original work would be greatly diminished. Thus, the ASJA and its members have a direct interest in the correct interpretation and vigilant enforcement of the copyright laws.

The ASJA is concerned that the court of appeals' decision in this case, which erroneously broadens the scope of the fair use defense, deprives copyright holders of valuable statutory protections, with grave implications for those who earn a living by writing. The ASJA seeks leave to file an amicus curiae brief to discuss the impact of this decision and to stress the importance of having the scope of the fair use defense clarified by this Court.

Respectfully submitted,

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BRIEF FOR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Society of Journalists and Authors, Inc. (ASJA) is a private, nonprofit, literary and educational organization whose membership consists of more than 700 independent free-lance writers of magazine articles, books and other nonfiction works. The ASJA is dedicated to improving the professional standards of nonfiction writing in the United States. To further this goal, the ASJA has developed a code of professional and ethical guidelines governing editor-writer relations and has organized numerous seminars and educational workshops.

For those who earn a living by writing, the economic and artistic protection of an original work is an absolute necessity. The Copyright Act of 1976 provides writers with the economic incentive to create and disseminate original works by granting them control over the publication and republication of such works. The members of the ASJA thus depend upon the copyright laws to protect their creative efforts from unfair use by others.

The ASJA and its members are greatly concerned by the court of appeals' decision in this case. That decision substantially broadens the scope of the fair use defense in copyright infringement cases by sanctioning as a "fair use" the quotation and misquotation for commercial purposes of over 7,000 words from the heart of a copyrighted work. This unprecedented construction of the fair use defense limits the protections granted by the copyright laws and, as a result, will diminish the incentive of authors to create original material. Ultimately, not only writers but the general public will suffer the adverse consequences of this decision.

SUMMARY OF ARGUMENT

The principal purpose of the Copyright Act of 1976 is to protect the economic interests of authors in order to provide them with an incentive to create original works for the benefit of the public. Writers depend upon the copyright laws to prevent unfair use of their original work. Thus, any unwarranted broadening of the scope of the fair use defense in copyright infringement cases improperly increases the risk of exploitation and diminishes the incentive to engage in creative activity, all to the detriment of the public.

The court of appeals held in this case that, as a matter of law, the verbatim quotation and misquotation of over 7,000 words from the heart of a copyrighted work for a profit-making purpose constituted a fair use. That

ruling cannot be squared with this Court's decisions in *Harper & Row* or *Sony Corp.* or with the purposes of the copyright laws. Rather, the decision below represents an unprecedented weakening of copyright protection. Given the Second Circuit's acknowledged leadership in the development of copyright law, and the status of New York City as the center of the publishing industry, review of this disturbing decision is essential.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO APPLY THE PRESUMPTIONS ESTABLISHED BY THIS COURT THAT COMMERCIAL INFRINGEMENTS HAVE AN IMPROPER PURPOSE AND CHARACTER AND HARM THE MARKET FOR THE COPYRIGHTED WORK.

As the Petition demonstrates, the court of appeals erred in its analysis of the fair use factors set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107. In examining the first factor of Section 107—the purpose and character of the use—the court failed to apply the presumption, recognized by this Court in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), that commercial infringements of copyrighted material have an improper purpose and character. Instead, the Second Circuit created a subjective test that requires an assessment of the infringing work to determine whether the content is primarily "commercial" or "educational." Under this new test, infringers would be able to benefit from the fair use defense merely by marketing their commercial exploitations under the guise of "educational" works, which might conceivably describe any work of nonfiction intended to inform and enlighten the public.

Similarly, in its analysis of the fourth factor of Section 107—the effect of the use upon the potential market

for or value of the copyrighted work—the court of appeals failed to apply this Court's prior holding in *Sony Corp.* that harm may be presumed when an infringing work has a commercial purpose. 464 U.S. at 451. Instead, the court of appeals erroneously placed the burden of proving harm on Maxtone-Graham.

The court of appeals' blatant refusal to apply the clear presumptions mandated by this Court substantially weakens the protections afforded by the Copyright Act. These rulings will have a severe adverse impact on professional writers, both within the Second Circuit, where most of the nation's publishing industry is located, and in other courts, which have traditionally looked to the Second Circuit for guidance in interpreting the copyright laws. For this reason, the ASJA strongly urges the Court to grant the petition for certiorari in order to correct the Second Circuit's misinterpretation of the fair use defense. *Sony Corp.* and *Harper & Row* mean very little if the Second Circuit's construction of those cases is allowed to stand.

II. VERBATIM COPYING OF MORE THAN 7,000 WORDS FROM A COPYRIGHTED WORK FOR A COMMERCIAL PURPOSE COUPLED WITH MISQUOTATIONS AND MISREPRESENTATIONS IS NOT A FAIR USE.

The ASJA is particularly troubled by the Second Circuit's egregious construction of the third fair use factor identified in Section 107 of the Copyright Act—the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The court of appeals' holding that Burtchaell's verbatim copying of over *7,000 words* from *Pregnant by Mistake* constituted a fair use essentially reads this provision out of the statute.

While it is difficult to place a quantitative limit on the number of words that may be appropriated and still fall within the scope of the fair use defense, the word-

for-word copying of over 7,000 words (which translates approximately into the length of the certiorari petition in this case) offends the ethical and professional sensibilities of the ASJA membership and makes a mockery of the Copyright Act protections. Burtchaell himself suggested that there is a recognized limit on quotations from copyrighted works, which he estimated to be 500 to 1,000 words. Petition at 4. Yet the volume of material Burtchaell appropriated from *Pregnant by Mistake* is many times that amount. Moreover, nearly one-fifth of the lead essay in *Rachel Weeping* consists of nothing more than verbatim quotations from Maxtone-Graham's copyrighted work. The appropriation is especially offensive in this case because Burtchaell was specifically denied permission to use Maxtone-Graham's material.

In addition to the sheer volume of material copied, Burtchaell appropriated "the heart of" *Pregnant by Mistake*. See *Harper & Row*, 471 U.S. at 565. Burtchaell used the most expressive and critical passages from 16 out of the 17 chapters in Maxtone-Graham's book. Similar to the facts in *Harper & Row*, Burtchaell structured *Rachel Weeping* around verbatim quotations from *Pregnant by Mistake*, which served as the "dramatic focal points" for his book. 471 U.S. at 566. As the Petition points out, other "courts have had little trouble finding that far lesser copyings were both quantitatively and qualitatively substantial in denying fair use defenses." Petition at 23.

The ASJA and its members are seriously concerned about the consequences of a decision that considers the verbatim quotation of more than 7,000 words, which constitute the heart of an original work, to be a fair use. From a purely economic standpoint, words are a writer's source of income. The copyright laws were created to ensure a fair return for an author's creative labor. The ultimate aim of this economic protection is to stimulate artistic creativity for the benefit of the general public.

See *Sony Corp.*, 464 U.S. at 432. Here, the copyright laws served the purpose of inducing the creation of an important new work. Ultimately, however, Maxtone-Graham was denied her fair return in this case. Her incentive to undertake creative endeavors in the future, as well as the incentive of all authors, may be dampened by the Second Circuit's willingness to sanction Burtchaell's enormous appropriation as a matter of law.

Another troubling feature of the decision below is the court of appeals' cavalier treatment of the acknowledged fact that *Rachel Weeping* contained numerous distortions of and misquotations from *Pregnant by Mistake*. The court held, again as a matter of law, that Burtchaell's distortions and misquotations were not deliberate. Even assuming that the court of appeals could properly have made that factual finding from the cold record, the ASJA believes that the subjective intent of the infringer should not be determinative. Instead, the courts below should have considered the totality of the circumstances in deciding whether the copyrighted work had been used unfairly. See *Sony Corp.*, 464 U.S. at 448 (fair use defense is an equitable rule of reason).

Even if not deliberate, a subsequent user's misquotations and misrepresentations are potentially damaging to the reputation of the original author of a work, can destroy the relationship between the author and his or her interviewees, and can diminish the author's ability to cultivate new sources. As Maxtone-Graham described in the preface to her book, the interviewing and editing process involved in *Pregnant by Mistake* was a painstaking and arduous task. It is difficult to see how Burtchaell's misquotation and distortion of the very material that Maxtone-Graham took such pains to report accurately could be considered a "fair" use of the copyrighted work.

In sum, the ASJA believes that the Second Circuit's decision in this case is among the most damaging attacks

on the protections granted by the copyright laws in recent years. We therefore urge the Court to accept the Petition in order to clarify the boundaries of the fair use defense —a defense that is almost routinely raised in suits alleging copyright infringement. The Second Circuit's decision broadens the scope of the fair use defense in a manner that is flatly inconsistent with this Court's opinions in *Sony Corp.* and *Harper & Row* and the rule in other circuits. If allowed to stand, the decision below will encourage the uncompensated and unfair appropriation of copyrighted works, to the deteriment of not only ASJA members and all professional writers but, ultimately, the general public.

CONCLUSION

The petition for a writ of certiorari should be granted.

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J. Burtchaell, *Rachel Weeping: The Case Against Abortion* (1984)	1, 2, 3
3 C.L.J. 40 (Dec. 1986)	4
K. Maxtone-Graham, *Pregnant by Mistake: The Stories of Seventeen Women* (1973)	1, 2, 3
3 Nimmer on Copyright § 13.05[B]	3
The Wall Street Journal, Oct. 16, 1986	4

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1330

KATRINA MAXTONE-GRAHAM,
Petitioner

v.

JAMES T. BURTCHAELL, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

The Brief in Opposition is instructive not for the arguments respondents make but for those they do not make. Respondents do not dispute the magnitude of their appropriation from *Pregnant by Mistake*.[1] Nor, despite repeated references to the "scholarly analysis" (Br. in Opp. 2, 7, 13) in "Rachel Weeping," do respondents chal-

[1] Although respondents agree that they copied more than 7,000 words from *Pregnant by Mistake* without permission, they object to our description of that number as 19% of the lead essay in *Rachel Weeping* on the ground that "the 'lead essay' has never been published separately from the entire book" (Br. in Opp. 8 n.2; see also *id.* at 16). Respondents' grievance (which does not refute our arithmetic) is not clear; surely respondents are not suggesting that the lead essay would have constituted an infringement if it had been published separately but became a fair use when combined in a book with other essays.

lenge the fact that "Rachel Weeping" was rife with distortions and misquotations from *Pregnant by Mistake.* Finally, respondents do not take issue with our interpretation of this Court's holdings in *Sony Corp.* and *Harper & Row*, nor with our discussion of the manner in which other courts of appeals have applied those holdings, nor with our representation that the questions presented are of substantial public importance.

Instead, respondents' entire defense of the decision below is predicated on their numerous misstatements of the facts and on their assertion that the Second Circuit "expressly recognize[d] and applie[d] [this Court's] guidelines" (Br. in Opp. 12) in *Sony Corp.* and *Harper & Row* and simply ruled against petitioner on the facts. As to respondents' misstatements, perhaps most egregious is their suggestion that this case somehow involves a dispute about the wisdom of abortion. See Br. in Opp. 1, 2, 16. It does not. This is a copyright infringement action arising from the quotation and misquotation of over 7,000 words after permission to quote was refused.[2] As to respondents' legal arguments, respondents are plainly wrong in contending (Br. in Opp. 14-15) that the Second Circuit acknowledged that *Rachel Weeping* was a work of a commercial nature and that commercial uses of copyrighted materials are presumptively unfair and may be presumed to cause harm to the market.

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[2] Additional misstatements include respondents' claims that all quotes from *Pregnant by Mistake* were clearly cited and fully attributed in "Rachel Weeping" (Br. in Opp. 8; see Pet. 6; C.A. App. 24a, 245a, 246a, 248a, and 249a); that *Pregnant by Mistake* was already out of print when *Rachel Weeping* was published (Br. in Opp. 14; see Pet. 3); and that petitioner did not contend below that respondents took the "heart" of her work (Br. in Opp. 8 n.2; see Maxtone-Graham C.A. Br. 29, Reply Br. 12.). Further misstatements in respondents' brief include, *inter alia*, misleading language and improper characterizations of petitioner and her motives—all unworthy of reply.

We are confident that when this Court studies the court of appeals' opinion in light of the arguments presented in the Petition, it will reject respondents' revisionist position. For example, if respondents are correct that the court of appeals viewed *Rachel Weeping* as a commercial work, for purposes of applying 17 U.S.C. § 107(1) and (4), why then did the court expressly refuse "to make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit' " (Pet. App. 18a), and why did it inquire into the content of the infringing work to determine whether its "educational elements" outweighed its "commercial aspects" (*ibid.*)? If respondents are correct that the court of appeals "recognize[d] *Sony's* rebuttable presumption regarding commercial uses" (Br. in Opp. 13), why then did the court find that this Court, in *Sony Corp.*, did not "intend[] to attach heightened significance to the element of commerciality" (Pet. App. 17a)?

Similarly, if respondents are correct that the court of appeals did indeed apply "*Sony's* presumption of future harm to the market for a work" (Br. in Opp. 14), why then did the court question whether this presumption survived *Harper & Row* and why did it emphasize that "the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects" (Pet. App. 21a)?[3] And

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[3] Even the points listed by respondents (Br. in Opp. 14) are demonstrably spurious: being out of print is no defense (see 3 Nimmer on Copyright § 13.05[B] n.51 (1986); see also page 2, note 2, *supra*); the comment about "thank you" notes confuses the delay in publishing a second edition of *Pregnant by Mistake* with market harm (see also C.A. App. 180a-181a); Burtchaell's description of petitioner's role as merely "reportorial" ignores her ownership by assignment in the copyright to the "rich and varied" stories told by the 17 women (Br. in Opp. 7, 14); and, lastly, as to the supposed differences in audiences and functions of the two books, see *Salinger* v. *Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987) ("For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words * * * [so] as to diminish interest in purchasing the originals."); see also Pet. 21.

if respondents are correct that the court of appeals did not decide any legal issues but merely ruled against petitioner on the facts (Br. in Opp. 14, 16), how then could the court, on summary judgment, have resolved several material and hotly-contested factual disputes (such as whether Burtchaell engaged in his distortions deliberately)? Respondents offer no answers to these questions.

In short, future litigants cannot take the Second Circuit's decision to be simply an application of previously settled law to the particular facts of this case. Rather, they will regard this decision—issued by "the *de facto* Copyright Court of the United States" (*Easter Seal Soc.* v. *Playboy Enterprises*, No. 85-3741 (5th Cir. Apr. 23, 1987), slip op. 3511)—for what it is: an unprecedented license to appropriate enormous quantities of copyrighted words and to republish them with "numerous inaccuracies" and "in a misleading light" (Pet. App. 15a, 23a).

It is not surprising that those knowledgeable in copyright law do not share respondents' sanguine appraisal of the court of appeals' ruling. Thus, as we pointed out in the Petition (at 12), the *Copyright Law Journal* recently concluded that the Second Circuit's construction of the fair use defense is "difficult to reconcile with *Sony*, *Harper & Row*, and other fair use decisions" (3 C.L.J. 40, 42 (Dec. 1986)).[4] Moreover, the amicus curiae brief submitted by the American Society of Journalists and Authors, Inc., states (at 6, 7) that the Second Circuit's decision "is among the most damaging attacks on the protections granted by the copyright laws in recent years." These conclusions, rather than respondents' assertions, reflect the most realistic and dispassionate reading of the court of appeals' decision and eloquently explain why this Court's review is essential.

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[4] The same point was made by the *Authors Guild Bulletin* (Winter 1987), at 27. See also *The Wall Street Journal*, Oct. 16, 1986, p. 16.

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